United States Court of Appeals

for the Second Circuit

APPENDIX

76-1030

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P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

SIMON BRACH,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

APPENDIX

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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RELEVANT DOCKET ENTRIES

Date	Proceedings
5-15-75	Before Costantino, J. - Indictment filed.
6-20-75	Notice of readiness for trial filed.
10-10-75	Letter from Steven Thal dated 10-6-75 filed: retainment as counsel for defendant Brach.
10-10-75	Letter from Steven Thal dated 10-9-75 requesting adjournment of trial filed.
10-16-75	Notice of motion to suppress evidence, returnable October 20, 1975 (defendant Bikel) (trial date set for October 20, 1975).
10-20-75	Before Bartels, J. - case called - trial adjourned to October 21, 1975 at 2:30 p.m.
10-21-75	Before Bartels, J. - case called - defendants and attorneys present - defendant Bikel's motion to suppress withdrawn - hearing on defendant Brach's motion to suppress is ordered and begun - hearing concluded - defendant Brach's motion to suppress is denied - defendants' motions to sever argued - hearing on severance motions continued to October 22, 1975.
10-22-75	Before Bartels, J. - case called - defendants and attorneys present - defendants' motion for severance is granted on consent; defendant Bikel is ordered severed with separate trial to be held subsequently to the instant trial - trial ordered and begun as to defendant Brach - jurors selected and sworn - trial adjourned to October 28, 1975.

Date	Proceedings
10-28-75	Before Bartels, J. - case called - defendant Brach and attorney Harry Youtt present - defendant's motion to exclude prior convictions argued - granted - trial ordered and begun - defendant's motion to dismiss the indictment - decision reserved - trial continued to October 29, 1975 at 10:30 a.m.
10-29-75	Before Bartels, J. - case called - defendant Brach and counsel present - trial reserved - defendant's motion to dismiss the indictment, etc. denied - defendant's motion for judgment of acquittal is denied - defendant's motion to strike portions of testimony of Agent O'Neill, etc. denied - defendant rests - Government rests - Judge charges jury - jury retires for deliberations at 2:00 p.m. - at 3:37 p.m. jury returns with a verdict of guilty on the one count of the indictment - sentence adjourned without date - defendant's motion to set aside the verdict is denied - trial concluded - bail continued.
12-9-75	Before Bartels, J. - case called - defendant and counsel present - defendant sentenced for a period of 5 years - bail continued pending appeal.
12-19-75	Judgment and commitment filed.
12-29-75	Notice of appeal filed.
1-8-76	Defendant Brach's requests to charge filed; defendant's memorandum in support of motion for judgment of acquittal filed; memorandum of law

Date	Proceedings
	filed of defendant Brach in support of motion to exclude evidence of prior convictions; affidavit in opposition to memorandum of law of defendant Brach filed (A.U.S.A. Richard Appleby).
1-13-76	Stenographer's transcripts dated 10-28-75 and 10-29-75 filed.
1-13-76	Record on appeal certified and mailed to Court of Appeals.
1-15-76	Acknowledgment received from the Court of Appeals for receipt of record on appeal.
1-19-76	Copy of order received from Court of Appeals and filed that record be docketed on or before 1-23-76.
2-10-76	Stenographer's transcripts dated 10-21-75 and 10-22-75 filed.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

SIMON BRACH and ITSHAK BIKEL,

Defendants.

- - - - - - - - - - - - - - - - - - X

Cr No. _____
(T.18, U.S.C., §§659 and 2)

75CR 403

THE GRAND JURY CHARGES:

On or about the 5th day of March 1975, within the Eastern District of New York, the defendants SIMON BRACH and ITSHAK BIKEL, with intent to convert to their use, did wilfully and knowingly embezzle, steal and unlawfully take from a motor truck approximately 166 cartons of car stereo units, having a value in excess of One Hundred Dollars ($100.00), which were moving as and constituted a foreign shipment of freight from Yokohama, Japan to Brooklyn, New York. (Title 18, United States Code, Sections 659 and 2).

A TRUE BILL

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

REQUEST FOR ADJOURNMENT OF TRIAL

BY HAND October 9, 1975

Honorable John R. Bartels
United States District Courthouse
Eastern District of New York
225 Cadman Plaza
Brooklyn, New York 11201

Honorable Sir:

This letter is written to formalize our request for an adjournment of the trial date in United States v. Brach et al., which we have discussed with Mr. Agnello of your office since we were retained by Mr. Brach earlier this week. We understand that it is Your Honor's desire to set the trial date in this matter for October 20th. Mr. Agnello has advised us that this trial date is most convenient for the Court because of an opening in the Court's calendar.

We wish to make this application for an adjournment on two grounds. First, as the Court knows, there is now pending an application pursuant to 28 U.S.C. §2255 in Brach v. United States with respect to a prior conviction of our client. The Court has granted the Government an extension of time until October 23rd to file responding papers therein. We believe that the instant case should be adjourned until such time as the Court has rendered a decision on the §2255 application. Such a decision would affect the determination as to whether or not Mr. Brach might appear as a witness in his own defense. I called this problem to the Court's attention previously, in my letter dated September 29th, regarding the application of the Government for an extension of time to file responding papers.

The second reason for our request for an adjournment is that our office, which consists of only two attorneys, is presently scheduled for trials commencing on October 20, October 28 and November 17. Each of these trials is anticipated to consume in excess of one week trial time. As I indicated to Mr. Agnello, should the Court deny our application to adjourn the trial of this matter until it disposes of the pending 3255 application, we would be prepared to begin the trial of this matter prior to October 20, for example, October 15 or 16. However, if this does not fit with the Court's schedule, in light of our other trial commitments, we would request an adjournment of the trial of this matter until early December.

Very truly yours,

Steven H. Thal

ST:hcj

CC: Richard Appleby, Esq.
Assistant U.S. Attorney

Miriam Seltzer, Esq.

DEFENDANT'S REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-against-	:	75 CR 403
SIMON BRACH and ITSHAK BIKEL,	:	J.R.B., U.S.D.J.
Defendants.	:	DEFENDANT BRACH'S REQUESTS TO CHARGE

Request No. 1

The foreign commerce character of the property stolen is an essential element of this offense. The foreign commerce character of a shipment commences at the time that the property is segregated for foreign commerce and comes into possession of those who are assisting its course in foreign transportation, and continues until the property arrives at its destination and is there delivered, either by actual unloading or by being placed to be unloaded.

Charge approved in United States v. Astolas, 487 F. 2d 275 (2d Cir. 1973) at 278 (verbatim except for insertion of term "foreign commerce" in place of "interstate."

I asked you whether he was actually

Defendant's Requests to Charge

Request No. 2

The facts that the shipment had been released by Customs, that it had been picked up by the ultimate consignee, that it had arrived at the location of delivery, and that it had been partially unloaded are all factors which tend to support a finding that the shipment had been "delivered" at the time they were taken. If indeed they were delivered at that time, they no longer constituted a foreign shipment. If you find any such facts to exist and if the existence of such facts creates a reasonable doubt that the shipment constituted a foreign shipment at the time of the theft as charged in the indictment, then you must find the defendants not guilty.

United States v. O'Kelly, 116 F. 2d 966 (8th Cir. 1941)
United States v. Gimelstob, 475 F. 2d 157 (3rd Cir. 1973)
United States v. Concepcion, 419 F. 2d 263 (2d Cir. 1970)
United States v. Jones, 446 F. 2d 49 (4th Cir. 1971)
United States v. Astolas (2d Cir. 1973)
United States v. Yoppolo 435 F. 2d 625 (6th Cir. 1970).

EXCERPTS FROM TRANSCRIPT

* * *

MR. APPLEBY: Absolutely.

THE COURT: Who is he?

MR. APPLEBY: His name is Israel Follman and the other person is Joseph Neuman.

THE COURT: Let's argue the admission or exclusion of this other evidence. Step up, please, Mr. Youtt and Mr. Appleby. I have read both your briefs and your affidavits and before making a decision, I want to be sure just exactly what is going to happen. One, you have some confessions here, have you not?

MR. APPLEBY: That's correct, your Honor.

THE COURT: Let me see them, please. I think a motion to suppress was made and I denied the motion.

MR. YOUTT: That's correct.

MR. APPLEBY: This is a copy of waiver of speedy arraignment. This is a copy of another speedy arraignment and this is a copy of the written statement -- I mean, the oral statement of Brach, which was --

THE COURT: I just want the written statements. All right. I'll hear the argument. As I understand, this is a matter involving the offer by the Government to introduce into evidence the three prior convictions of Simon Brach. One in connection with the trial

held in '72, I guess it was, of Brach and his mother for sale and possession of stolen stereos. The other was an indictment in New Jersey, I think 1972, for the possession of a stolen automobile. At the Charter Bus parking lot near Exit 7 of the -- in New Jersey. There is testimony going to be offered that the doctor who reported the stolen car, will testify that the doctor who reported it stolen, Lincoln Sedan, and the New Jersey State Trooper who arrested Brach in the stolen automobile after a routine stop -- Then as I understand it, Brach pled guilty to Count 2, which charged him with bringing -- with being in a stolen motor vehicle into the state. February 15, 1972, at 1:00 a.m., Roosevelt Raceway, Long Island, Brach was found in possession of a '71 Buick, which had previously been reported stolen.

The Government has available to testify an elderly man who was the owner of the automobile, as well as a Nassau County detective who arrested Brach in the automobile. Brach pled guilty February 15th to the reduced crime of attempted unauthorized use of an automobile in the County Court, Mineola. He was sentenced to 30 days, with credit for time served.

What do you have to say, Mr. Youtt, with

THE COURT: You signed the book that you

MR. YOUTT: Your Honor, I'm asking that all of these convictions be excluded, upon the ground that their probative value to the extent that it does exist or may exist is heavily outweighed by the danger of a prejudicial inference being drawn. I think there is always a danger of prejudicial inference in a situation of prior convictions of an accused on trial. The danger being that the jury will convict him or tend to convict him because they have heard that he is a bad man or has been a bad man before and not because the evidence in this case proves him guilty of the facts alleged in this case. Here when we address the issue of probative value, as the cases which I cited or some of the cases --

THE COURT: I read them.

MR. YOUTT: One of the -- one of the compelling concerns of the Court is whether it is necessary. If it is not necessary --

THE COURT: You're right. This is a question of balancing. It is a very -- sometimes it is a very delicate task and I am -- that's why I asked you, Mr. Appleby, let me see the confessions and I am saying to you, what, Mr. Appleby, what is the necessity for this?

MR. APPLEBY: Your Honor, in any 659 case such as this, whether it charges possession or theft, the most difficult burden the Government has is to prove intent and knowledge.

THE COURT: He has already signed a confession.

MR. APPLEBY: That's correct, your Honor.

THE COURT: Isn't that intent?

MR. APPLEBY: I'm sure Mr. Youtt, being a skilled counsel, will be able to chip away at a confession and the weight of that.

THE COURT: Let's put it this way. We'll take a way. We'll see what happens.

Do you have any witnesses you are going to put on?

MR. YOUTT: As I said, I may have one witness, your Honor.

THE COURT: Why can't you use this for rebuttal then?

MR. APPLEBY: Your Honor, may I just -- perhaps we can clear this up. If I could find out from Mr. Youtt what his defense strategy is in terms of what the defense is here, perhaps we can discuss more meaningfully how important this prior conviction is.

THE COURT: I will say to you, Mr. Youtt, that if he didn't have the evidence he has, I certainly

would let into evidence the conviction as to the stolen automobile which was brought into New Jersey. I would exclude the plea of unauthorized possession of an automobile. I might let in some testimony, but not the plea of guilty to unauthorized possession, because unauthorized possession doesn't show, it seems to me, any intent, willfullness, in the case of a theft. So I would be inclined to exclude that, but the stolen automobile, passenger car, I'd let in.

I'd have a question about my -- the conviction on possession, sale and possession of stolen stereos. The reason I'd have a question about that is, I would want to be very careful, so that the jury doesn't get confused and reach a conclusion because these stereos were involved then and stereos are involved here now, the jury may conclude that because he had possession of -- knowing possession of stolen stereos then, he just was a sort of an addict on stealing stereos.

But I wouldn't make a final decision on that. But I would be inclined to let in the stolen passenger car and if, depending upon the necessity of the occasion, I might let in the sale and possession of stereos.

That is to say, if that is necessary on

THE COURT: Did you see it, Mr. Youtt?

rebuttal, depending upon who you bring in and whether there is contradictory evidence which would affect this confession. But as it now stands, it seems to me the confessions are enough and there is no need for these other convictions, except to just induce the jury to convict the man because he has committed crimes in the past or that he is -- or because he seemed to be a person who has a criminal background.

That I will not permit. Therefore, that's my reasoning and that's my ruling, as of now. So, it depends upon whether it is going to be necessary on rebuttal.

MR. YOUTT: Fine.

THE COURT: I don't see any necessity for it at all. Except to confuse the issue and make it very difficult for Mr. Brach to get a fair trial. I want him to get a fair trial on this offense, and not on any other offense. If you didn't have signed confessions and there was conflict of testimony, then my rulings might be different. I see no necessity for this.

All right.

MR. APPLEBY: Your Honor, could you also consider allowing in one or two other convictions after Mr. Youtt has cross-examined the Government's

witnesses and when --

THE COURT: I don't know about that, no. I'll have to see. On rebuttal. I said, on rebuttal. Cross-examination -- all depends. He has to have a trial. He has a right to cross-examine witnesses, but I have made my rulings as of now.

MR. APPLEBY: Thank you.

MR. YOUTT: Thank you.

THE COURT: All right. Where do we stand, gentlemen?

MR. APPLEBY: I have to make an opening statement, your Honor, and then we have our witnesses.

THE COURT: You can't make an opening statement right now. How about your witnesses, are they here?

MR. APPLEBY: They're here, your Honor.

THE COURT: All right. All witnesses must leave the room, if they're here.

Let me ask you this: Is this defendant, Itshak Bikel going to testify in this case?

MR. YOUTT: Not on behalf of the defendants, your Honor.

THE COURT: He can't testify on behalf of anyone else, I don't think. We'll let him stay in the courtroom.

* * *

THE COURT: You are not talking too much louder.

ISRAEL FOLLMAN - DIRECT

* * *

case and make a determination of whether or not the Government proves its case against the defendant guilty beyond a reasonable doubt.

Thank you.

MR. APPLEBY: The Government calls Israel Follman, your Honor.

I S R A E L F O L L M A N , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. APPLEBY:

Q How old are you, Mr. Follman?

A Twenty six.

Q Where do you live?

THE COURT: We don't hear you. That can't be on. All right.

Q Where do you live?

A 188 Clymer Street in Brooklyn.

Q Are you here as a witness as a result of a subpoena having been issued for you?

A Yes.

THE COURT: Oh, no. It has to be louder. I can't hear. Put this -- that's it. Thank you very much. All right.

Q Where do you work?

A Fried Trading.

Q What? Fried Trading? Is that the answer?

A Yes.

THE COURT: Okay. Just relax. Don't be afraid, Mr. Follman.

Q What kind of job do you have with the Fried Trading Company?

A Drive a truck there.

THE COURT: Drive a truck.

Q How long have you been employed by the Fried Trading Company?

A Five years.

Q Could you tell the members of the jury what is the business of the Fried Trading Company?

A They import, you know, goods.

THE COURT: You have to speak louder.

A They import goods. And they sell them.

Q Can you tell us generally what type of goods they import?

A Electronics.

Q Does that imclude stereo equipment?

A Yes.

Q Who is the owner of the Fried Trading Company?

A Mr. Ishak Fried, I-s-h-a-k F-r-i-e-d.

Q How many employees are there at the Fried Trading Company?

A You mean, total?

A In total, approximately?

A Approximately 20.

Q Do any other members of the Fried Trading -- Fried family work at the Fried Company?

A Yes.

Q Can you tell us their names, please?

A His wife.

THE COURT: Who?

THE WITNESS: His wife.

THE COURT: You mean, Mrs. Fried?

THE WITNESS: Mrs. Fried.

THE COURT: What's her name? Sally?

THE WITNESS: Sally, yes.

THE COURT: All right.

THE WITNESS: And the two children.

THE COURT: Two children?

THE WITNESS: Actually all of them work there.

THE COURT: What's the names of the children?

THE WITNESS: Nachman.

THE COURT: Spell that.

THE WITNESS: N-a-c-h-m-a-n.

THE COURT: Nachman Fried. Is that right?

THE WITNESS: I think it's Brach.

THE COURT: Nachman Brach. What's the next?

THE WITNESS: Zigmond.

THE COURT: Zigmond what?

THE WITNESS: Brach.

THE COURT: Okay. Anyone else?

THE WITNESS: From the family?

THE COURT: Yes.

THE WITNESS: That I don't know.

BY MR. APPLEBY:

Q Do you know the defendant Simon Brach?

A Yes.

Q Would you point him out, please?

THE COURT: Stand up, Mr. Brach, please. You know him, do you?

THE WITNESS: Yes.

THE COURT: Thank you.

Q When is the first time you met Simon Brach?

A When I was a little kid. About 15 years ago.

THE COURT: Do you have difficulty, members of the jury, hearing? If you do -- all right. This lady back there has a little difficulty.

Can you speak a little louder. Is that possible?

THE WITNESS: Yes, sure.

THE COURT: All right.

Q Did Simon Brach ever work for the Fried Trading Company?

A Yes.

Q Was his employment terminated? Did there come a time when he no longer worked for the Fried Trading Company?

A I wouldn't know. I mean, it would be -- I would be in and out.

THE COURT: He is not working there now, is he?

THE WITNESS: Today?

THE COURT: Or -- was he working there six months ago?

THE WITNESS: He was working there but I don't know exactly when he was and wasn't. I wouldn't know.

THE COURT: All right.

Q There came a time when Mr. Brach was no longer employed by the Fried Trading Company. You remember that, don't you?

A Yes, but I don't know if he was on the payroll or not.

Q I didn't ask you whether he was on the payroll.

I asked you whether he was actually employed working at the Fried Trading Company as an employee?

A I wouldn't know. He might have been working. I don't know. He might have missed three days. I don't know. I don't understand what you're asking.

Q I'd like to direct your attention to March 5, 1975. Was Mr. Brach working at the Fried Trading Company on that day?

A He might have been. I don't know. As far as I'm concerned I don't know if he was working there or not.

Q Well, you arrived at the Fried Trading Company that day about 10:00 a.m., isn't that correct?

A Right.

Q Okay. The previous day, do you recall him having been there working?

A You mean, actually working, no.

Q What about the day before that?

A No.

Q How about the day before that?

A I don't think so.

Q Isn't --

A He might have come in. I don't know if he was working or not.

Q For many months Mr. Brach hadn't been working

there? You hadn't seen him there, let's put it that way?

A He used to come around. I used to see him.

THE COURT: As a working man? Don't you know whether he was working there or not, don't you know that?

THE WITNESS: How do I know?

THE COURT: He was there.

THE WITNESS: They get paid for doing nothing.

THE COURT: What? The family gets paid for doing nothing?

MR. APPLEBY: I move to strike that answer, your Honor.

THE COURT: Yes.

MR. YOUTT: If it will help to move things along, we will stipulate at or about that time Mr. Brach was not working at the Fried Trading Company.

THE COURT: Okay. He was not an employee.

MR. YOUTT: Was not an active employee of the Fried Trading Company at that time.

THE COURT: Not an employee. Either he was an employee or he wasn't.

MR. YOUTT: He was not an employee. That's fine.

THE COURT: All right.

BY MR. APPLEBY:

Q Now, could you describe the -- strike that. I'd like to direct your attention to March 5, 1975. Were you working that day?

A Yes.

Q And I'd like to direct your attention specifically to the morning. Did you go to a pier in Brooklyn that day?

A Yes.

Q Could you tell us what you did that morning for the -- from the time that you arrived at the pier?

THE COURT: What do you mean "pier"? The jury doesn't know what you are talking about.

MR. APPLEBY: I'm sorry.

Q What was the purpose of your going to the pier?

THE COURT: What pier? There is a pier in Brooklyn? What pier didyou go to?

THE WITNESS: Pier 12.

THE COURT: Pier 12. All right.

Q What did you do at Pier 12, Mr. Follman?

A Picked up two shipments and brought them to the place.

Q What kind of merchandise was it?

A Car stereos.

Q What happened when you arrived at the pier?

A I came in there. Surrendered my papers and I got the load.

THE COURT: You signed papers?

THE WITNESS: You get them -- you get your stuff, the load.

THE COURT: They piled it on?

THE WITNESS: Me and--

THE COURT: Someone placed it on your truck?

THE WITNESS: No. Me and somebody else. They give you a helper.

THE COURT: They gave you a helper and did you help to load it on the truck?

THE WITNESS: Yes.

THE COURT: And then they gave you what kind of papers? A bill of lading or what?

THE WITNESS: A tally.

THE COURT: A what?

THE WITNESS: A tally.

THE COURT: A tally?

THE WITNESS: A tally.

THE COURT: Tally. I see. Did you sign anything?

THE WITNESS: Yes.

THE COURT: Do you agree it was a foreign ship-

THE COURT: What did you sign?

THE WITNESS: In a book.

THE COURT: You signed the book that you received?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. APPLEBY:

Q Incidentally, do you know what kind of car stereos they were?

A I know now.

Q What kind?

A AM/FM car stereo

THE COURT: What?

THE WITNESS: AM/FM.

THE COURT: AM?

THE WITNESS: AM/FM.

THE COURT: Oh.

Q Do you know the brand name?

A I guess it's Mecca. That's the brand we use.

MR. APPLEBY: I would ask that these two cartons be marked for identification and there are two units inside of the carton which I'd also like marked for identification.

THE CLERK: Government's Exhibit 1, carton

to the steamship company. Then he makes the delivery and

marked for identification.

Government's Exhibit 2, second carton.

Government's Exhibit 3, carton and contents, smaller carton and contents marked for identification and Government's Exhibit 4 similar carton --

THE COURT: What was it?

THE CLERK: Similar carton. They're two large cartons, your Honor.

THE COURT: And 4 is the smaller one?

THE CLERK: No. Three and 4 are small ones. I would call or as much as I --

THE COURT: All right.

THE CLERK: Four marked for identification.

(So marked)

BY MR. APPLEBY:

Q Mr. Follman, would you please step off the stand for a moment. Can you look at Government's 1 and 2, which are the cartons, carefully, the sides -- and tell us whether you recognize the type of carton that you are looking at?

A Yes.

Q Do they look like the same cartons that you had packed up?

A Yes.

also from the pier and he works with you to get it on the

Q Did you ever look inside of these cartons that day?

A No.

Q So you don't recognize Government's 3 and 4?

A I know the model number but I wouldn't know. This is not the first time we brought this model in.

Q I understand. All right. Incidentally, Mr. Follman, I'd like you to look at Government's 1. Was this the condition that the carton was in with this marking P 708, New York, No. 56, with that kind of a marking?

A They usually come like that,

Q I'd like you to look at Government's 2. I'm placing the carton in the same position and apparently there had been a -- a sticker removed.

THE COURT: You have it way down there. The jury doesn't know what he's testifying to.

Q There has been a --

THE COURT: You can step down.

Q Is that the way the carton came in?

A They can do that in the pier.

Q I didn't ask you whether it could come in. Do you recall seeing any cartons that had that sticker removed like that?

A No. I don't recall anything like that.

A Well --

Q All right.

THE COURT: Did you see it, Mr. Youtt?

MR. YOUTT: No, I didn't.

MR. APPLEBY: I'm sorry.

THE COURT: All right.

Q After you had the truck loaded -- incidentally, can you describe your truck to the members of the jury just for a moment?

A What my truck looks like?

Q Yes.

A It's a 22 foot white truck.

THE COURT: Twenty two foot truck, how wide?

THE WITNESS: How wide?

THE COURT: How wide?

THE COURT: Eight foot. Eight feet.

Q After the truck --

THE COURT: What's the tonnage, do you know?

THE WITNESS: What's the amount?

THE COURT: Tonnage?

THE WITNESS: About 10,000 pounds.

THE COURT Ten thousand tons?

MR. YOUTT: He said pounds.

THE COURT: Pounds. I see. That means five tons.

BY MR. APPLEBY:

Q Now, Mr. Follman, after the truck was loaded, what did you do?

A Went back to the place.

Q What's the place?

A 167 Clymer Street.

Q What's at 167 Clymer Street?

A Fried Trading.

THE COURT: What? What's there?

MR. APPLEBY: Fried Trading Company, your Honor.

THE COURT: Oh, Fried Trading?

Q Did you park your vehicle any place?

A Yes.

Q Where did you park it?

THE COURT: You have to talk louder. Maybe everyone else hears it but I don't have the benefit of that microphone and I don't hear you. Can you try to talk louder, please?

THE WITNESS: Yes.

THE COURT: All right.

What is the story? He's at the Fried Trading Company?

Q Where did you park the truck, Mr. Follman?

A About 50 feet in front of the building.

THE COURT: You are not talking too much louder. About 50 feet from what?

THE WITNESS: From the building.

Q Was this on Clymer Street?

A Yes.

Q Now, could you describe the Fried Trading Company, the physical layout of it? Just briefly.

A It's a four story building. It's got a yard in front of it. To the right side, it's got an open yard.

Q What is the yard used for?

A You park your trucks, cars there.

Q Is that where you unloaded merchandise as well?

A There is a loading dock there.

Q Is that generally where the merchandise is unloaded?

A No, not generally. Because we got two dock So we usually --

Q There is another dock?

A When you back into the elevator.

Q That's on the Fried Company premises?

A Yes.

Q Your truck wasn't on the premises at that time?

A No. It was about 50 foot away.

Q And the merchandise after you parked it had not been unloaded, is that correct?

A No.

Q All right. After you parked the truck on the street, what did you do?

A Took down two cartons, took them inside and told them I was here.

THE COURT: You took out two cartons and what happened?

THE WITNESS: I told them I was here.

THE COURT: You told the --

THE WITNESS: The boss.

THE COURT: Your boss, you were here.

Q Who was your boss?

A I call them all boss but the real boss is Mr. Fried.

Q Who was the boss that you reported the fact that you had arrived?

A Mr. Nachman.

Q You showed him two cartons?

A I didn't show him anything.

Q I thought you said you took them out?

A I took them upstairs to the lab. I always do that.

THE COURT: He said he took them inside.

THE WITNESS: With the knishes.

Q What was the purpose in showing these cartons to the technicians?

A It's an old procedure.

Q For what purpose?

A I don't know. They probably check them out.

Q To see whether the load is satisfactory or not?

A Yes.

Q Any defects?

A Right.

Q And presumably if there were defects, the load would be rejected?

A Right.

MR. YOUTT: Objection.

THE COURT: Yes. Sustained.

Q To your knowledge, what happens when the merchandise is found defective?

A Send it back.

Q Could it be almost immediately?

A Send it back immediately.

MR. YOUTT: Objection, your Honor.

THE COUKT: I'll take it, as a -- what is customary, what the practice is. Would the practice

be to send back the merchandise immediately if you found it to be defective?

THE WITNESS: It would take a couple of weeks.

THE COURT: A couple of weeks before you send it back?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. APPLEBY:

Q After you arrived -- after you saw Mr. Nachman, what happened?

A Told him I was here and then he told me to go out.

THE COURT: Of course, you didn't have to tell him you were there. He saw you?

THE WITNESS: Of course. And told me to go out, back the truck into the dock.

Q In order to unload the merchandise, is that correct?

A Presumably, right.

Q All right. Then what happened?

A Then I went out and the truck was gone.

Q It was gone from the place that you had parked it?

A Right.

Q Did you look around for it?

THE COURT: The truck was gone when you went out, is that right?

THE WITNESS: Yes.

Q Did you look for it?

A Well, it wasn't on the block. It's a small block so I knew it wasn't there.

Q Did you search the area?

A Yes. When the cops came, we took a ride around.

Q I see. So what did you do after you discovered that the truck was missing?

A Went back and told them the truck isnt't there.

Q Whom did you tell?

A Nachman.

Q Do you know what he did? Physically?

A He called the cops.

Q Did you see who took the truck?

A No.

Q After the cops -- did there come a time when the police arrived?

A Did there come a time? Did they arrive, you mean?

Q Yes.

A Of course.

Q Could you describe what happened after the police arrived?

A They came down. They asked what happened. Told them the truck was gone. And they took me for a ride.

THE COURT: Took you for a ride. All right.

Q Did you know a person by the name of Joseph Neuman?

A Yes.

Q Was he on the scene there?

A I wouldn't recall.

Q Do you know whether any suspects were given to the police at that time?

A I wouldn't know.

Q You searched and then there came a time you began searching the area with the police for the truck?

A Right.

Q Did you find the truck with the police?

A No.

Q What happened after that?

A Took me back to the police.

Q Then you continued working as normal?

A Right.

Q Incidentally, do you know how -- how big a business the Fried -- Fried's have?

Q How much money they make?

THE COURT: No.

Q In terms of --

THE COURT: All right. Ask him. Do you know how big a business? You can talk about -- if you do know, the gross?

THE WITNESS: I wouldn't know. I know they do pretty good but I don't know.

THE COURT: Volume you might testify. Do you know?

THE WITNESS: I wish I make that much.

THE COURT: So you don't know exactly in figures the volume of merchandise?

THE WITNESS: There are rumors but I don't know if they're true. I'm not the accountant.

THE COURT: Big place? Warehouse?

THE WITNESS: I don't know what you call big.

Q Do you have -- are you friendly with Simon Brach?

A What do you mean friendly?

Q He was working -- at the time he was working there?

A Right.

Q Was your relationship friendly or hostile or

not?

A Just like workers. Co-workers.

MR. APPLEBY: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. YOUTT:

Q Mr. Follman, do you go directly to the various piers to pick up shipments?

A Yes.

Q All right. I take it that each time you go, you take the same truck is that correct?

A Ninety per cent of the time.

Q Is there more than one truck?

A Two.

Q Two trucks?

A One smaller.

Q Was this the bigger one?

A Yes.

Q When you have a big shipment you go to the pier to pick it up in that truck, is that right?

A Right.

Q Are there ever times when somebody from the pier actually delivers the goods right to your door or do you have to go and pick it up?

A It happens at times, once in a while that they give out the work to somebody else.

Q Is that frequent or infrequent?

A Infrequent.

Q Most --

A We have too much work, we give it out.

Q Only when you have too much work?

A Right.

Q Most of the time it's you that's picking the goods up, isn't that right?

A Yes.

Q Is there more than one pier that you go to, to pick up foreign shipments?

A Yes.

Q I take it, that these foreign shipments, most of them come from Japan, is that right?

A Yes.

THE COURT: I don't think it was brought out that that was a foreign shipment, except to the extent he went to the pier and the inference and implication was it was a foreign shipment.

Did you bring out that fact?

MR. APPLEBY: No. But I think after this witness that will become clear.

Mr. Youtt, just a couple of more questions.

THE COURT: Mr. Youtt is bringing it out.

MR. APPLEBY: All right.

THE COURT: Do you agree it was a foreign shipment?

MR. YOUTT: We're not going to -- the papers are going to show the point of origination of the shipment, your Honor, and I think that it would show that it originated in Japan.

THE COURT: All right.

BY MR. YOUTT:

Q All right. When you went to pick up or when you go to pick up these shipments that you receive, would you describe the procedure that's -- that you operate under, when you are at the pier?

A Well, you get a set of documents. That's called pickup orders.

THE COURT: Where do you get those from?

THE WITNESS: From the broker.

THE COURT: Where is the broker?

THE WITNESS: Custom house broker.

Q Do you know what a custom house broker does? Is it a fact that a custom house broker takes care of the formal routing of goods through the customs process?

A He does the first part of it. He's got to

Q ...w, okay. I have no further questions at this

go through the customs house. He's got to present them with the original bill of lading and he has to go pay the freight to the steamship company. Then he makes the delivery order. That's called a pickup order and he gives it to my company.

Q He gives it to your company and your company gives it to you?

A Right.

Q You take this pickup order, what do you do with it?

A Go down to the pier. Present it over there. And they route it. They see if it matches to their -- they got a book. They see if it matches. Once they clear it, they give it back to you. You go out there and get your freight.

Q You yourself go out and get the freight?

A You go out to -- you back into a loading dock and a hi-lo brings it over to your truck.

Q When you say a hi-lo, that's this sort of -- some sort of a vehicle for carrying merchandise?

A Right.

Q Who is -- drives the hi-lo?

A He's employed by the pier.

Q He brings it out and puts it on your truck?

A Right.

Q You tell him then where to put it or how to

Is that correct, Mr. Youtt?

load it?

A I get a man, extra man, called a labor man, also from the pier and he works with you to get it on the truck.

Q Do you have to pay him any money?

A Yes. The company pays him.

Q When you say "the company," the Fried Trading Company pays?

A Right.

Q He helps you to load?

A Yes.

Q You tell him where to put the goods as they come off the hi-lo and then on to the truck?

A Right.

Q Did you do that on this particular day?

A We worked together.

Q All right. Once that truck is loaded, then what happens to it? What happened in this particular case?

A You go back. You go back to the delivery clerk. I forgot to mention that when you come in, you have to go to customs anyway. You have to get the papers cleared by customs.

Q Customs clea s the papers that thebroker gave to you?

A Right.

Q Okay. What does that mean?

A Well --

Q What happens? What do you see happen?

A They stamp it. Either they put it into a public store or they stamp it anew. If it's a public store like in this case it was --

THE COURT: Public what?

THE WITNESS: Public store.

THE COURT: Store? What does that mean?

THE WITNESS: That means that they take down a carton from the shipment and they keep it for a couple of days, take it down to the customs house and they open it over there.

THE COURT: You mean it's stored at the customs house?

THE WITNESS: Right.

THE COURT: I see.

BY MR. YOUTT:

Q All right. So when they clear your papers, they stamp them, is that correct?

A Right. They put on a release stamp.

Q Is that before the goods are loaded on to your truck?

A You mean, you get the release stamp you're talking about?

Q Yes.

A It's after.

Q After. So you've got the goods loaded on the truck. Then you go to customs?

A Yes.

Q Then they stamp a release on that?

A And then you sign out by the delivery clerk.

Q Did the customs sign a release in this particular case?

A Yes.

Q Then you went to sign out with the delivery clerk?

A Yes.

Q What do you do there?

A You sign how many you got. Like in this case I think it was 160 cartons.

THE COURT: 160 cartons?

THE WITNESS: Yes. I don't remember exactly the amount.

Q Did they ask you when you leave -- at that point are you free to leave?

A Right.

Q When you leave, do they ask you where you are going to go with the goods?

A No.

Q Do you have to tell them what you are going to do?

A No.

Q Now, how long have you worked for Fried Trading?

A Five years.

THE COURT: Five years?

Q Have they always been located at Clymer Street?

A No. They just moved about a year ago.

Q Where were they located before then?

A 45 Bedford Avenue.

THE COURT: Where?

THE WITNESS: 45 Bedford Avenue.

THE COURT: Bedford?

THE WITNESS: Yes.

Q Do they still have a facility at Bedford Avenue?

A No.

Q Totally relocated to Clymer Street?

A Correct.

Q You testified on direct examination that Mr. Nachman -- is it Fried or Brach?

A Brach.

Q Nachman Brach, who is one of the bosses, called the police?

A Yes.

Q Would that be the City of New York Police?

A Right.

Q Are the City of New York Police the individuals who responded and came out?

A Correct.

Q And you were interviewed by a City of New York Police --

A Right.

Q Okay. And then you said you took a ride, is that in a New York Police car?

A Right.

Q When you arrived back -- after this you left the pier, you came -- what did you do when you left the pier in this particular case?

A You mean --

Q Did you come directly back to the Fried Trading Company? Did you stop anywhere?

A I made one phone call, on the way coming in.

Q When you say a phone call, where did you stop to make the phone call?

A About two blocks from the pier.

THE COURT: You have to -- you did what? Stop where?

THE WITNESS: About two blocks from the pier.

Q Would that be at a pay phone booth?

A Pay phone.

Q Was it on the street or did you have to go into a side street, where was it located?

A Van Buren Street, I think.

Q After making the phone calls, did you go anywhere or do anything before coming back to the Fried Trading Company?

A Did I do anything at the store? I don't know what you mean. It was a coffee shop. I had a coffee.

Q You went and got some coffee and you made a phone call and then you came back to the Fried Trading?

A Right.

Q When you came back to Fried -- I take it that you came to the Fried Trading Company because that was what you were required to do in connection with your employment, is that right?

A Yes.

Q I don't imagine that it had to be told to you after having done it so many times but that's your job?

A Right.

Q Correct? And so far as your job is concerned you do what Mr. Fried or the bosses, so to speak, tell you to do or require you to do at the Fried Trading Company, is that correct?

A Right.

Q So you came back to the Fried Trading Company. You parked the truck. Now, had you discussed with anybody what you would do with the truck when you came back before you left? Is that question clear?

A Before I left the pier?

Q No. Before you left that day to go and pick up the shipment, did you discuss with anybody at the Fried Trading Company what you would do with that shipment when you got back to the company?

A No.

Q Okay. So you came back and you parked the truck. Is that something you do frequently?

A Yes.

Q Park it on that -- in that area frequently?

A Yes.

Q Is that on the street?

A Yes.

Q Is that a place where you regularly park the

Fried Trading Company truck?

A For a small amount of time. I wouldn't leave it there for hours. Because --

Q Okay. Now, at that time, I take it that -- well, when you got out of the truck you went to the back of the truck and unloaded some cartons, is that what you said?

A I took off -- back of the truck.

Q Okay. How many cartons, if you recall, did you take out of the load at that time?

A Two.

Q Okay. So I take it then you closed the truck door and came into the company?

A Yes.

Q How long were you away from your truck if you recall?

A I'd say about ten minutes.

Q Now, did you personally take those cartons up to wherever they were going in the Fried Trading Company?

A I put them into the elevator.

Q Somebody else took them off, is that correct?

A I guess so.

Q When you went out to get the truck, when you found it missing, what were you intending to do? Had you been told to do something with the truck?

A I don't understand.

Q Had you been told to do something with the truck?

A When I went out to look for it? Told me to back it in.

Q Back it in. Did he tell you to do something else with it?

A No.

Q I see. When you say, back in, where?

A To the elevator. To the loading dock.

Q I see. Now, the loading dock, is that all on the premises of the Fried Trading Company?

A Yes.

Q And how far is the loading dock that you are referring to from the place where the truck was parked when you first left it?

A Fifty feet. About.

THE COURT: What?

THE WITNESS: About 50 feet.

THE COURT: Fifty feet?

THE WITNESS: Yes.

THE COURT: Wait a minute. Let me understand. You were parked outside the Fried Trading Company? Alongside the street, right?

THE WITNESS: Yes.

THE COURT: On the side and the entrance of Fried Trading Company is there -- but they had a yard also?

THE WITNESS: Right.

THE COURT: On one side where you could -- there was a dock and there was another dock on the other side?

THE WITNESS: Yes.

THE COURT: They told you totake this truck and bring it into the dock and unload it?

THE WITNESS: They didn't say unload it. Sometimes I just back in and it stays there for the rest of the day.

THE COURT: They tell you to back it in? Were you going to back it in?

THE WITNESS: Back it in.

THE COURT: They told you to do that?

THE WITNESS: Yes.

BY MR. YOUTT:

Q The fact is, that when you first came to the vicinity of the Fried Trading Company that day, you parked as close as you could to the loading -- to that loading dock, is that correct?

A Yes.

Q Okay. And when you say about 50 feet away, would that mean somewhere in front of the Fried building that you parked?

A It would be before.

THE COURT: Fifty feet away of what?

MR. YOUTT: Of the building, the Fried Trading Company occupancy.

THE WITNESS: Right.

THE COURT: Then there was a basement in front of the --

THE WITNESS: Before. I would say I was by the next building.

THE COURT: I see. The next building. On the side?

THE WITNESS: Yes.

THE COURT: It wasn't exactly in front of the door?

THE WITNESS: No.

THE COURT: I see.

BY MR. YOUTT:

Q You say that -- what is your practice with respect to backing into -- into that loading area near the elevator? You sometimes back the truck there and don't

unload it?

A Yes.

Q The truck just sits there for a period of time?

A Yes.

Q There then comes a time when you do unload the goods into the Fried Trading Company?

A Yes.

Q You were just planning it -- at the time that you went out and found the truck missing, you were just planning to back the truck in but not to do anything more with it, is that correct?

A I was waiting for instructions. He might tell me take the truck, deliver someplace else. He might. I never know what he's going to do with it.

Q Okay. But you do what he says, is that Correct?

A Yes.

Q Referring to "He", you are referring to who, Mr. Fried?

A All of them.

Q All of them at Fried Trading Company? They're the only people that give you orders?

A Right.

Q As to where to take the truck, is that right?

A Yes.

MR. YOUTT: Okay. One moment, your Honor.

Q Mr. Follman, just a couple of more questions. When you -- you testified earlier that Mr. Brach worked at the Fried Trading Company at a period of time when you also worked there, is that correct?

A Yes.

Q Was he at that time one of your bosses?

A He would tell me to do something?

Q Yes.

A I would have to do it, yes.

Q Okay.

THE COURT: What did he say?

THE WITNESS: He would have -- if he --

THE COURT: If he told you to do something, you'd have to do it?

THE WITNESS: Yes.

Q All right. You know what jobs Mr. Simon Brach had at the Fried Trading Company whenever he worked there?

A He used to sell. He used to receive the goods, he used to check them out.

THE COURT: I'm sorry. I just -- what did he do?

THE WITNESS: He did everything. Let's put

it that way.

THE COURT: He did everything. All right.

Q Now, okay. I have no further questions at this time.

THE COURT: Any other witness? Any further questions?

MR. APPLEBY: One more question.

REDIRECT EXAMINATION

BY MR. APPLEBY:

Q Mr. Fried told you to back the truck at one time?

A Not Mr. Fried.

Q Who was it?

A Nachman.

Q Nachman? I'm sorry.

MR. APPLEBY: Your Honor, the Government calls Joseph --

THE COURT: Thank you.

MR. APPLEBY: I'm sorry. Thank you.

The Government calls Joseph Neuman.

Your Honor, before -- Oh. I should -- I'd like to introduce some documents before the witness comes out.

Your Honor, pursuant to a stipulation between

documents be marked in evidence that relate to the shipment in question here.

Is that correct, Mr. Youtt?

MR. YOUTT: Yes, your Honor. We're prepared to stipulate that the admissibility of these documents and additional facts that may be inferred therefrom.

THE CLERK: Government's Exhibit 5, photocopy of bill of lading. I'm sorry. Dated December 30, 1974, marked in evidence.

Government's Exhibit 6, photocopy of bill of lading -- Government's 5, there is an identification number reading 401843.

Government's Exhibit 6, bill of lading, dated December 30, 1974, identification number 401896.

Government's Exhibit 7, special customs invoice, dated December 30, 1974, identification number 401843. and Government's Exhibit 8, special customs invoice dated December 30, 1974, identification number 401896, marked in evidence.

(All so marked)

THE COURT: Marked in evidence?

MR. APPLEBY: They're in evidence, your Honor.

THE COURT: All right. Special customs, what do you call it?

THE CLERK: The last two, your Honor, special customs invoices.

THE COURT: All right.

THE CLERK: The first two are copies.

THE COURT: I see. I have that.

MR. APPLEBY: Now, your Honor, I can either pass these to the jury now or I can read parts of the document. Whichever you prefer.

THE COURT: It's up to you.

MR. APPLEBY: All right.

THE COURT: Do you want to read it?

MR. APPLEBY: Yes.

THE COURT: It might be faster. The jury can take them into the jury room, if they wish.

MR. APPLEBY: Government's Exhibit 7.

THE COURT: You have to read louder.

MR. APPLEBY: Government's Exhibit 7 is a special customs invoice, the -- the importer or place of importer is Yokohama, Japan, December 27, 1974, name of exporting carrier is VICTORY GRAMOR, it says here.

THE COURT: Victory what?

MR. APPLEBY: GRAMOR, G-R-A-M-O-R.

THE COURT: Company?

MR. APPLEBY: I believe that's the ship, your

Honor.

THE COURT: Oh.

MR. APPLEBY: VICTORY GRAMOR.

THE COURT: VICTORY GRAMOR. All right.

MR. APPLEBY: Date of shipment, December 30, 1974. Name and address of vessel, is Kiyo, Incorporated, K-i-y-o, and there is a location in Tokyo. Name and address of purchaser is Fried Trading Company and it states that the address is 45 Bedford Avenue, Brooklyn, New York. The first special customs invoice, that's the Government's Exhibit 7 says -- in describing the quantity and description of goods, says 506 sets or 85 cartons FOB Japan. It says, with respect to marks, 708 New York. It says below that, Made in Japan. In description, it says, Eight track car stereo cartridge tape player with AM/FM/MPX radio model K-708. It has marine insurance premium 147, $147.65. Per set, it says $38. And C and I, apparently that means cost and insurance, New York, $19,000 -- $19,375.65.

THE COURT: That's the first?

MR. APPLEBY: Yes.

THE COURT: What is that?

MR. APPLEBY: Special customs invoice.

THE COURT: All right.

MR. APPLEBY: Then on Government's Exhibit 8, everything is the same, except that in quantity and full description of goods, it says 494 sets or 83 cartons and this time the cost and insurance, New York, and in United States dollars, is $18,916.13.

THE COURT: How many sets with the first?

MR. APPLEBY: The first set was 85 cartons and the second was 83 cartons. So that would be 168 in all.

THE COURT: All right.

MR. APPLEBY: And the bill of lading in Government's Exhibit 5 has four marks and numbers, 708 New YOrk, Made in Japan, and it says 85 cartons, Car stereo tape player. The bill of lading in Government's Exhibit 6 says under marks and numbers, 708, number of packages, 83 cartons, I believe. Car stereo tape players.

That's it.

All right, at this point, the Government will call Joseph Neuman.

(Continued on next page.)

JOSEPH NEUMAN, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. APPLEBY:

Q How old are you, Mr. Neuman?

A Twenty eight.

THE COURT: Twenty eight?

THE WITNESS: Yes.

THE COURT: All right.

Q Where do you live?

A 184 Clymer Street.

Q Where do you work?

A I have a grocery, 185 Clymer Street.

THE COURT What's the name of the place?

THE WITNESS: Grocery.

THE COURT: Goldstein's?

THE WITNESS: Grocery store.

THE COURT: Grocery store? I'm sorry.

Q How long have you had that grocery store at that location?

A One year.

THE COURT: Four years?

THE WITNESS: One year.

Q Are you near the Fried Trading Company? Is your business near the Fried Trading Company?

A Yes.

Q How close?

THE COURT: Next door?

THE WITNESS: A couple of housesdown. 165. A couple of houses down.

Q Do you know the defendant Simon Brach?

A Yes.

Q Would you point him out, please.

A Yes. This is Simon Brach.

Q How long have you known him?

A A nice couple of years.

Q How many years?

A Fifteen, sixteen.

Q Would you call yourself a friend of Mr. Brach?

A What?

Q A friend of his?

A The whole family. I know the whole family very good.

Q Are you in court as a result of a subpoena?

A Yes.

Q I'd like to direct your attention to approximately March 5, 1975.

A Yes.

Q Were you working at your grocery store that day?

A Yes.

Q I'd like to direct your attention specifically to approximately 10:00 a.m.. Did you see anything unusual occur that day? Did you see Simon Brach that day?

A I saw him over the window. I was thinking -- I was thinking that he's it. I was --

Q Did you see --

THE COURT: He was taking the what?

THE WITNESS: I saw -- I saw the truck is backing out. And I was saying to my brother, I think so that he's it.

THE COURT: The teaser?

THE WITNESS: That Simon Brach is taking the truck out.

THE COURT: What did you say about teaser?

THE WITNESS: Nothing teaser. Teaser is no.

MR. YOUTT: That he is it. He is it.

JUROR NO. 12: That he is it.

THE COURT: I --

THE WITNESS: I was thinking that he's it. My brother said that not he is it but I was thinking

he is it because I asked my brother before, I didn't see him, he used to be working there. He used to be partners with the brothers. I didn't see him but just now I think he was it.

THE COURT: You mean he was in the truck?

THE WITNESS: Yes. I saw with the glasses. I think so that he was driving the truck.

THE COURT: Was he backing out or going forward?

THE WITNESS: Backing out.

BY MR. APPLEBY:

Q Where was it backing out, on to what street?

A To Division Avenue.

Q Division Avenue is a one-way street?

A Two-way.

Q Two-way street?

A Yes. Division Avenue is a two-way street.

Q How fast was Mr. -- how fast was Brach going?

A He backed up.

Q Would you say he was backing out slowly, quickly, medium?

A He backed out, how fast you go backwards? He backed out. I mean, how fast? Regular. I -- he backed out the truck like somebody wants to back out. It depends what

driver the guy is. Somebody backs out fast and somebody backs out slowly.

Q Would you say this --

A He watching. Somebody couldn't drive, he watch it. Somebody who could drive, he -- he goes.

Q On this occasion would you say that this was a person who drives pretty -- a truck pretty quickly in reverse?

MR. YOUTT: Your Honor, objection. He's answered that question.

THE COURT: I don't know. Did he go fairly -- he didn't hesitate?

THE WITNESS: He's usually a fast driver, Simon. Simon is a fast driver. He never drives slowly. This is usually what Simon is, a fast driver.

THE COURT: He --

THE WITNESS: Yes. This --

THE COURT: You think he backed out fast that day?

THE WITNESS: Yes, a little bit fast. A little bit but this is his normal way like he drives all the time.

Q Is Clymer Street a one-way street?

A Yes.

THE COURT: You know, I am going to have to stop, at this point. I am awfully sorry that I have to stop so early but I'll be back at -- it's 25 of 12:00.

MR. YOUTT: Your Honor, perhaps if Mr. Appleby is almost through, I have only got maybe one question of this witness.

MR. APPLEBY: Not too much longer. A few more questions.

THE COURT: All right. Proceed.

BY MR. APPLEBY:

Q So you saw Brach in the driver's seat, is that correct?

A What?

Q You saw him in the driver's seat?

A Yes. Only one person.

A Where did you see the truck go to? What direction?

A To Lee Avenue.

Q Lee Avenue?

A Yes.

THE COURT: Lee what?

Q Lee Avenue?

A Lee Avenue.

MR. APPLEBY: Lee Avenue, he said, your Honor.

Q After he -- you saw Brach back out on to Lee Avenue, what happened?

A Nothing. I was thinking it's -- he works there. He's still a partner, I was thinking. But then his brother came to me, they took away his truck. They took away his truck. I said, "Nobody took it away. Your partner took it away. I mean your brother took it."

Q How?

A He used to stay there all the time. And then he says, oh I says, I says, then he took it away.

Q Then did you -- would you describe Mr. Nachman's emotional state at that time?

A What do you mean?

THE COURT: What did he say to you?

THE WITNESS: That -- that the truck is missing then.

Q Did he say "missing"?

A I mean, the --

THE COURT: You told him that Simon Brach was driving it back?

THE WITNESS: Yes.

THE COURT: What did he say?

THE WITNESS: Then he went out to the cops

and says that Simon took it.

THE COURT: Did he tell you he went to the cops?

THE WITNESS: I saw him. I saw him he went outside because cops was outside already. I didn't see cops coming in the street but I just see when I walked out.

BY MR. APPLEBY:

Q So you remember the cops -- the police, excuse me, arrived on the scene shortly thereafter?

A What?

Q You remember the police arriving at the scene?

A No. I saw when -- when he called in the cop to me. I didn't see how they arrived on the block. They called in the cops to me in the store.

THE COURT: They called in the cops after he talked to you or before?

THE WITNESS: No. After he talked to me.

THE COURT: After he talked to you, he called in the cops?

THE WITNESS: Yes.

THE COURT: All right.

MR. APPLEBY: I have no further questions, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. YOUTT:

Q Only one question. Was it the City of New York Police that came?

A Yes.

MR. YOUTT: Okay. I have no further questions.

THE COURT: All right. We'll come back here. Let's see. It is now almost 20 of 12:00. Then I suppose we ought to come here at 1:00 o'clock, or 1:10. Okay?

Please do not discuss the case among yourselves ladies and gentlemen.

Thank you.

(Recess taken for lunch.)

(Continued on next page.)

MR. APPLEBY: Your Honor, Mr. Nachman Brach is in the witness room now. I don't believe I am going to be using him as a witness. I am not positive. He is available to Mr. Youtt to be a witness.

Furthermore, the Friedman family is available to be called as witnesses and I would have Agent O'Neill get them if it is necessary. They are available and he can use them.

THE COURT: It is in the form of an announcement rather than an application.

Mr. Appleby?

MR. APPLEBY: Yes, sir?

THE COURT: Is Mr. Nachman Brach here?

MR. APPLEBY: He is in the witness room.

Your Honor, the government calls Joseph Karritue.

J O S E P H K A R R I T U E , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Please state your name for the record and please spell it.

THE WITNESS:Joseph Karritue, K-A-R-R-I-T-U-E.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q Where do you live, Mr. Karritue?

A 1018 Wyckoff Avenue.

Q Where do you work?

THE COURT: This is Brooklyn?

Q Is it in Brooklyn?

A Yes.

Q Where do you work?

A Kent Knitting Mills, 963 Kent Avenue.

Q Also in Brooklyn, New York?

A Right.

Q What is your job at the Kent Knitting Mills?

A I am super of the building.

Q Do you know an individual by the name of Macharthur Harvey?

THE COURT: H-A-R-V-E-Y.

A I do.

Q Could you describe the Kent Knitting Mills, the physical layout of the Kent Knitting Mills, to the jury?

A We have a parking lot that holds about twenty cars.

Q Is there a building there?

A Yes, there is.

Q Is the parking lot next to it?

A There is the parking lot right in the front of the building.

Q Is the parking lot completely visible from the street?

A It is.

Q The whole parking lot?

A Not the whole, no.

Q I'd like to direct your attention to March 5th, 1975.

Were you working at the Kent Knitting Mills that day?

A I was.

Q Were you working there between 11:00 o'clock a.m. and 12:00 o'clock noon?

A I was.

Q Did anything unusual occur at that time?

A I came out of the building and I see a truck half-way on the platform and half off.

Q Could you describe that truck?

A A white truck but I didn't take no notice to the name on it.

Q Did you see how big it was?

A It was a pretty big truck, yes.

Q Could you make an approximation as to how

many feet it was?

A About twenty feet.

Q Could you continue, please?

A I said, "What are you parked here for?"

Q You were speaking to somebody at this point?

A To the man who was driving the truck. I am pretty sure he was the boss, he said.

Q Continue, please.

A He said, "I will be out of here in about ten minutes."

Q Before you go on, Mr. Karritue, could you describe that man?

A Sort of a heavy-set man, 220 pounds, with a little beard around his face.

Q Mr. Karritue, I'd like you to take your time and look around the courtroom. Look very carefully and tell the members of the jury whether you see the man that you say you saw at the Kent Knitting Mills on that day.

THE COURT: Don't look in the jury box.

A You can't tell, they may have him over there, too.

THE COURT: Strike that from the record.

A I think that is the man (Indicating).

THE COURT: With the cap on his head?

THE WITNESS: Yes.

THE COURT: Stand up.

Is that the man?

THE WITNESS: Yes, that is him.

MR. APPLEBY: Let the record reflect the witness identified the defendant.

Q You were speaking to Mr. Brach?

A I was.

Q And you told him, what?

A What do you park here for? You are blocking up the loading platform.

He said, "I will be out of here in ten minutes."

I said, all right. And so I walked around the yard and I stood there by the boiler room looking at the truck.

In the meantime Mr. Cohen upstairs says, "Joe, do me a favor and go to the post office."

I got in a car and drove down to the post office for a special delivery letter. When I came back they were gone.

Q Did you see any other vehicles besides the big truck?

A Yes, I did.

Q Could you tell us what you saw?

A A small Ford panel truck alongside the big truck. They were loading the big truck into the small panel truck.

Q You said they. Were there other people

involved?

A Yes.

Q Could you tell us what these other people were doing?

A One fellow was in the big truck handing some boxes out to the fellow by the panel truck and he was filling them in the truck and somebody in there was packing them away.

Q These are the two other people besides Mr. Brach?

A Yes.

Q Any other person at that place?

A A fellow in the truck, in the van, but I couldn't see him.

Q How many people in all did you see that day?

A Three.

Q You did not see a fourth person?

A He was inside the truck. I didn't see him at all.

Q Did you see a thinner man?

A I did. He had a long coat on and he had a beard, too; very thin.

Q What was this man who was thin doing?

A He just come in off the street and the man who had charge of the big truck, he said to him, you can back in as soon as the little truck gets out of here.

Q Who was speaking to whom?

A That man over there was speaking to the man who came in the yard from the street.

Q That thin man with the beard?

A Yes. "You can back in after this fellow gets out of here."

I said, "No, you can't back in here. You are blocking up the whole place."

He didn't answer me.

Q Did the thin man do anything else?

A No, he stood there.

Q Did he do anything with his coat?

A No.

Q Did you see the thin - - you mentioned two vehicles.

A Yes.

Q Were there three vehicles altogether?

THE COURT: Three?

Q Two panel trucks and the big truck, right?

A One panel truck.

Q Any other trucks?

A A U-Haul, a U-Haul truck was out in the street.

THE COURT: You had a U-Haul out in the street?

THE WITNESS: Yes.

Q What happened with respect to the U-Haul truck?

A I went on another errand.

Q Just answer the question.

Did you see this U-Haul truck you say you saw, out in the street?

A Yes.

Q Did you see it in any other location?

A No, I didn't. I told the fellow - -

THE COURT: When you say "he," let's identify that "he" is the thin man or the big man.

THE WITNESS: Tall, thin man, about my size.

THE COURT: That is the "he"?

THE WITNESS: With a beard,yes.

THE COURT: We will call him "X," shall we?

THE WITNESS: I guess so.

THE COURT: "X" did what?

THE WITNESS: He didn't say nothing at all. He stood there and took orders from the man who drives the big truck.

THE COURT: This man?

THE WITNESS:"You can back in when he gets out of here with the small truck."

Q Who were you speaking to at this point?

A The man who drives the truck.

THE COURT: The big man told the little man, "You can drive there"?

THE WITNESS: Yes.

THE COURT: And you said, "No, you can't," to the big man?

THE WITNESS: That is right.

THE COURT: "You are blocking up the hard"?

THE WITNESS: That is right.

THE COURT: What happened to the U-Haul truck?

THE WITNESS: I went on another errand and when I come back - - I was back in five minutes - - the big truck and little truck and U-Haul truck was gone.

Q Let's back up.

These people that you observed, would you describe how they were acting? Would you describe their behavior?

MR. YOUTT: I object to the form.

THE COURT: Describe how they acted.

A The man over there was walking over there doing nothing.

THE COURT: Let's get names.

Call him Mr. Brach.

A (Continuing) He was walking around the truck. One fellow in the truck handing the boxes out to another fellow. That fellow was handing them to another fellow inside the van. I couldn't see him.

Q Let me ask you this: Based upon your observations of these people did you feel they were trying to avoid you?

MR. YOUTT: I object.

THE COURT: Sustained.

Describe how they acted. Were they doing it fast?

THE WITNESS: Very fast.

THE COURT: Working very fast?

THE WITNESS: Very fast.

THE COURT: That is, loading the little panel truck from the big truck?

THE WITNESS: Right.

THE COURT: Did you see any loading

from the big truck to the U-Haul?

THE WITNESS: I did not.

MR. APPLEBY: I have no further questions, your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. YOUTT:

Q Prior to the occasion that you just testified about, had you ever seen the big man before, the man that you identified as Mr. Brach?

A I never did.

Q Have you seen him personally since that time?

A Yes.

Q Aside from today?

A Today I seen him.

Q Did you also at that time speak with the little man, the smaller man, that you testified to who had a beard?

A I did not.

Q Did you see him at the same time that you saw Mr. Brach?

A I did.

Q Do you see him in the courtroom today?

MR. APPLEBY: I object to this.

THE COURT: I [illegible] sustaining it.

Q Mr. Karritue, had you seen the other individual whom you saw on that particular day at any time previous to that?

A No, I did not see them around at all, no.

Q You say you work for the Knitting Mill?

THE COURT: Kent Knitting.

A Kent Knitting.

Q Is that related to the American Business Company?

A It is in the same building.

Q You work for the American Business Company, too?

A I am the super of the building. I do favors for Kent; run to the post office and little odds and ends when I can.

Q Have you ever heard of the Fried Trading Company?

A No, I never did.

Q I believe their address is 126 Clymer Street. Do you know that location?

A Yes.

Q Is that nearby the location where you work?

A It is about two miles away.

Q Two miles?

A About that, yes.

Q Is that in the same general neighborhood?

A No, it is in Williamsburg.

Q The area where you work in is called what? It is not Williamsburg?

A No.

Q You are familiar - -

A Yes, I am.

Q You never heard previous to this time of Fried Trading Company?

A No, I never did. No.

MR.YOUTT: I have no further questions.

THE COURT: Any redirect?

MR. APPLEBY: The government calls Macharthur Harvey.

M A C H A R T H U R H A R V E Y , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your name for the record.

THE WITNESS: Macharthur Harvey.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q Where do you live, Mr. Harvey?

A 250 Clifton Place, in the Bronx.

Q Where do you work?

A Kent Knitting Mills, 963 Kent Avenue, Bronx.

Q What is your job with the mills?

A Stock and shipping clerk.

Q Do you know a Mr. Joseph Karritue?

A Yes.

Q Do you see him every day?

A Yes.

Q Is there a large yard near the mills?

A Yes, all our trucks and stuff stop, back up to the platform to receive stuff in the yard.

Q Mr. Harvey, I would like to direct your attention to March 5th, 1975 between 11:00 o'clock a.m. and 12:00 o'clock noon.

Were you working that day?

A Yes.

Q Did anything unusual occur at that time?

A Well, yes, around the hours of 11:00 o'clock to 12:00 in the morning this truck, like a heavy straight job truck, not a tractor-trailer, a straight job, if you know

what I am talking about. It is a heavy truck like a half of a tractor-trailer that had been sitting out there for a while. I went out, I had a truck on my own, and this truck was blocking my truck from receiving my stuff.

At this time me and Joe was wondering where was the driver and stuff. At this time a heavy-set man and an Oriental-like fellow was out there in the yard. This truck, small green van, had backed in.

Q Where was it in relation to the big truck?

A On the side facing the door.

Q Continue, please.

A At this time the Oriental guy - -

THE COURT: What kind of guy?

THE WITNESS: Spanish-looking or Oriental guy, like you know.

THE COURT: Did he have a beard?

THE WITNESS: Long hair.

THE COURT: Long hair.

Q You said there were two people so far; any other people?

A Not at that time, not yet.

Q Could you first describe the big man?

A He was like a very heavy set and he had a long beard all the way around.

Q How else would you describe him?

A I think he was Jewish because I used to live in a Jewish neighborhood and I know how Jewish people look.

Q Look around the courtroom very carefully and tell the members of the jury whether you recognize the big man with the beard.

A Yes.

Q Could you point him out?

A This fellow here (indicating).

MR. APPLEBY: Let the record reflect that the witness pointed out the defendant.

THE COURT: Is that the man?

THE WITNESS: No doubt bout it.

Q Could you tell us what the big man was doing?

A He would more like conduct the transaction from the smaller guy, passing it to the older guy in the smaller van. He would pass it.

THE COURT: He was passing it or directing it?

THE WITNESS: He was directing it.

The smaller guy would pass it to the older man in the green van.

After the first van was filled up that left at that time.

Q You left the area for a moment?

A Yes, you know, I had a couple of boxes that had to go back in. I took half my stuff in and came back out to get the rest.

Q And did you come back in a little while?

A One or two minutes.

Q What did you observe when you came back?

A At that time I observed a U-Haul truck that had backed in, a fellow, another fellow, got out.

Q Can you describe that fellow?

A He was like,I would say he was Jewish too because he had a beard, he had grown a beard.

Q Was he fat?

A He was thinner than the heavy-set guy and heavier - -

Q Do you recall what he was wearing, his clothes?

A It was like a dark jacket, dark clothes, dark long jacket like.

Q Could you continue with what you observed?

A He was talking to the heavier-set guy and I guess after whatever they were saying the truck was already backed up around the same spot that the small van was and so this guy that was already up in the truck, the skinnier guy, they started loading the U-Haul van at this time.

Q You identified the defendant Brach.

THE COURT: When they loaded the U-Haul van did they load it from the big truck or not? Where did they load it from?

THE WITNESS: From the big truck,yes.

Q Mr. Harvey, I ask you to look at Government's Exhibit 2 for identification.

Does this look like the cartons they were loading?

MR. YOUTT: Objection.

THE COURT: I will permit it.

A Yes, it looks like it.

Q With respect to the defendant Brach that you just identified, did he give you anything on this occasion?

A Yes, after all the complaining that me and Joe was making and after he was doing the transaction, he said, he gave me two dollars and he said "Go ahead and get you a cup of coffee or something for me bothering your time and stuff, holding on to your time."

Q Would you say the people were acting in a hurried manner? Were their movements hurried?

A They were trying to hurry up and do their business and leave.

Plus, we were rushing them too because I had plenty of work to do.

MR. APPLEBY: I have no further questions.

CROSS-EXAMINATION

BY MR. YOUTT:

Q You testified that you recognized the man you have identified as Mr. Brach as being Jewish. Is that what you testified to?

A Yes.

Q Did you base part of that decision in your own mind at that time on the fact that he was wearing a head covering?

THE COURT: Yarlmulka.

A Yes.

Q What kind of hat was he wearing?

A It was like the round kind.

Q Like he is wearing today?

A Yes.

MR. YOUTT: No further questions.

MR. APPLEBY: The witness is excused.

THE COURT: Thank you, Mr. Harvey.

MR. APPLEBY: Your Honor, at this time

the government calls Agent Gerry O'Neill.

G E R A L D O ' N E I L L , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Please state your name for the record.

THE WITNESS: Gerry O'Neill.

THE CLERK: Please speak slowly and loudly when you are questioned.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q By whom are you employed, Mr. O'Neill?

A United States Customs Service.

Q How long have you been with the Customs Service?

A Seven years.

Q What are your duties?

A I investigate criminal activities, mostly cargo thefts and truck highjackings from the piers and airport areas.

Q Are you the case agent in charge of investigating the case of the defendant Simon Brach?

A Yes, sir.

Q Did there come a time when you obtained an arrest warrant for Mr. Brach?

A Yes, I did.

Q Do you recall what date that was?

A I think the arrest was March 6 of this year.

Q Do you recall when you were able to arrest Mr. Brach?

A I believe it was April 21st of 1975.

Q Could you tell the members of the jury what efforts you made to locate Mr. Brach during the six-week period?

MR. YOUTT: Objection as to relevancy.

THE COURT: I will take it subject to connection.

A Basically we put him on the nationwide computer as in CIC.

This is a system by which we can have an alarm for a person around the country.

In addition, that means the police department and the like are privy to this information.

In addition, I was out to the house many times.

Q Whose house?

A Mr. Brach's house. I was in contact with his brothers,

stepbrothers and stepfather and I went out to the Big "A," Aquaduct Race Track, to the OTB parlors, and in general - -

MR. YOUTT: I object, your Honor.

THE COURT: Yes? What did you say? OTB?

THE WITNESS: OTB parlors.

THE COURT: All right, I think he has a right to say where he tried to investigate.

MR. YOUTT: Your Honor, may I - -

THE COURT: It does not mean that the defendant frequented those places. It simply means that he went there, that is, the investigator, not Mr. Brach.

MR. YOUTT: On the basis of relevance and danger of prejudice.

THE COURT: Just ask him in general language if he went to the regular places that he always goes to in order to ascertain the whereabouts of someone who he cannot find, generally.

THE WITNESS: Yes, your Honor.

THE COURT: You have a routine, I suppose?

THE WITNESS: Exactly, right.

THE COURT: You follow that routine in order to see whether or not you can locate a person like Mr. Brach, is that right?

I am going to ask it in general terms.

Did you go every possible place where you thought Mr. Brach might be found?

THE WITNESS: Yes, Judge.

BY MR. APPLEBY:

Q Could you tell us approximately how much time you spent on trying to find Mr. Brach during the six-week period?

MR. YOUTT: Objection.

THE COURT: I will take the objection.

You didn't find him and you made every effort every day, every other day?

THE WITNESS: It was both, every other day, some days more than others, some days not at all.

THE COURT: That is a little hard to understand.

You mean every other day? How many days during the week?

THE WITNESS: An average of two or three days a week.

THE COURT: Two or three days a week you went to find him and you could not find him?

You knew where he lived?

THE WITNESS: Yes, sir.

THE COURT: Did you go to his house?

THE WITNESS: There was never anybody at the house.

THE COURT: You went at night as well as in the daytime?

THE WITNESS: Yes.

BY MR. APPLEBY:

Q There came a time when you arrested Mr. Brach.

A That is correct.

Q Could you tell us the geographical location of the place of the arrest?

A Atlantic Avenue, a few blocks from this building.

Q Did you place him under arrest?

A Yes, sir.

Q Were you with another agent?

A Yes.

Q Did you tell Mr. Brach anything prior to his arrest?

A I just very briefly explained what he was being

arrested for, for a theft being occasioned on March 5th.

MR. APPLEBY: I ask that a card be marked as the next government exhibit.

THE CLERK: Government Exhibit 9, a card, marked for identification.

(So marked.)

MR. APPLEBY: Unless there is any objection I now move to have this admitted into evidence.

THE CLERK: Government's Exhibit 9, Right's Card, marked in evidence.

(So marked.)

Q I show you Government's Exhibit 9 in evidence. Do you recognize the card?

A It is the kind of card I carry with me.

Q Did you do anything with the card?

A I read the rights as stated in the card and I asked him if he understood the rights. That terminated the conversation.

Q Could you read the rights to the members of the jury?

A After identifying myself I advised the person that he is being detained or under arrest, that he was under arrest, and I told him that before we ask any questions

it is my duty to advise you of your rights.

You have the right to remain silent, anything you say could be used against you in court or other proceedings. You have the right to consult an attorney before making any statements or answering any questions and you may have him present with you during questioning.

You may have an attorney appointed by the United States Magistrate or the court to represent you if you cannot afford or otherwise obtain one.

If you decide to answer questions now with or without a lawyer you have a right to stop the questioning at any time, to stop the questioning for the purpose of consulting a lawyer.

However, you may waive the right for advise of counsel and the right to remain silent if you so desire.

Do you understand your rights? Do you waive your rights?

Q After you read the rights, what occurred?

A He interrupted quite a few times and he said that he did understand his rights. He said he knew the rights and I explained that I am forced to read the entire statement, which I did.

Q What happened then?

A Well, we proceeded to my office over at World Trade

Center, that is the Towers, and we photographed Mr. Brach, fingerprinted him.

Q What time was this?

A It was 1:00 o'clock - - he was arrested about 1:00 o'clock so make it 1:30 or twenty minutes to two.

Q He was being printed and photographed at the World Trade Center?

A Yes, he was taken upstairs where he filled out the standard forms that we fill out relevant to background, date of birth, weight, height, address, Social Security number and that sort of thing.

He gave all the information very voluntarily relevant to his background. I asked him where he had been and he said he was in town and made a few light-hearted comments.

I asked him if he understood what the charges were against him and at this point we started to speak more specifically.

Q Did you do anything with respect to that card?

A When we got down to more serious conversation I read the rights again.

Q Using the same card?

A I used the same card.

THE COURT: You then read the rights another time? In the office?

THE WITNESS: In the office.

THE COURT: You read it on the street?

THE WITNESS: In the car.

THE COURT: In the car going from Atlantic Avenue?

THE WITNESS: Yes, and again in the office where he was listening to me more carefully.

THE COURT: You read the rights again in the office?

THE WITNESS: Right.

Q Can you tell us what occurred?

A I told him what he was arrested for. I said it was a theft on March 5th. I told him where it was, on Clymer Street, and I told him we had some witnesses.

I said that I felt that we had a very good case against him.

I didn't explain very specifically what it was, what that information was. I advised Mr. Brach that I felt he was in trouble and I asked him if he would like to cooperate and if he would like to make a statement and if he did in fact want to waive his rights which were to

remain silent.

He stated quite unexpectedly, and this is not the exact words, but to the effect that the load is intact and it is still around.

THE COURT: The load is intact?

THE WITNESS: Intact.

THE COURT: And it is still around?

THE WITNESS: It is still around.

Q Previous to that statement had you received any telephone calls from anybody at the World Trade Center?

MR. YOUTT: I object. The question is too broad.

Are you referring to this case?

THE WITNESS: I don't follow you.

THE COURT: With respect to this case?

A I don't think so, no.

Q Now, he stated that the load is still around. What happened after that?

A Then he almost immediately after making that remark told me he would like to speak with the United States Attorney. I don't remember if he said Mr. Pucci or just United States Attorney.

I called you up and you happened to be in your

office. You were aware of the fact that we were looking for Mr. Brach and I explained that we had arrested him. I probably said that he had been placed under arrest. I can't remember. I called up and told you that Mr. Brach wanted to make a statement, wanted to speak with the United States Attorney and I was going to bring him right over.

Q So there came a time when you arrived at the United States Attorney's office?

A We came right over here and that terminated the discussion.

Q What time did you arrive at this courthouse?

A 3:00 o'clock or 2:30.

Q What occurred after you arrived at the United States Attorney's office?

Whose office did you go to?

A To your office.

Q What occurred in my office?

A I spoke to you and told you I thought Mr. Brach had made an admission and that I thought you should speak with him now. And we did.

Q Did I tell anything to Mr. Brach at that time?

A You read him your standard rights card that all the United States Attorneys read to people before they are interviewed. I don't remember if he signed it but you read

the rights.

Q After he was read the rights by myself, what occurred?

A You and I interviewed him and another agent, Peter Reilly, was with us.

Mr. Appleby was familiar with the case as I was so we were able to ask the relevant questions.

THE COURT: Who is "we"?

THE WITNESS: Mr. Appleby and myself.

THE COURT: Somebody must have been the questioner.

THE WITNESS: I asked the questions. I was doing most of the questioning.

THE COURT: What did you ask?

THE WITNESS: To tell us what happened on March 5th.

He said that yes, he would tell us what happened on March 5th.

Q Incidentally, did he want to know what was in it for him?

A He asked you, "What is in it for me?"

I think that was probably the exact wording. He brought this up in our pre-conference discussions, you or somebody - - Mr. Brach used the word, I think, I think

he said could he get acquitted, can he get off. What is in it for him?

Mr. Appleby advised him that the government policy is not to make promises of any kind but that, however, any and all cooperation that he should extend to the government would be made known to the judge, every bit of it.

Q At what time?

A Some time prior.

Q When would the cooperation that he would give be made known to the judge, at what point in the proceeding?

A I don't know.

THE COURT: Well what did you say? Did you say that you were going - - if you cooperate I will make that cooperation known to the judge, when?

THE WITNESS: I don't know. I don't remember what he said. I don't remember if he will make it known to the judge at the time of the trial or immediately or when.

Q Did Mr. Brach ask any questions with respect to immunity?

A That is the word, with respect to immunity. Yes, he wanted to know.

Q What was told to him?

A No.

Q Then what occurred?

A Then he proceeded to make the statement relevant to the events that occurred on that date.

Q Tell us what Mr. Brach told you as best you can recall.

A On the morning of March 5th he was driving in his own car, a 1963 blue Plymouth on the BQE heading towards Williamsburg with his friend Itshak Bikel.

THE COURT: He was driving in a blue car?

THE WITNESS: Blue Plymouth. It was his own car.

He stated that he saw,directly in front of him on the parkway, a truck, a Fried truck. He stated that he knew immediately it was a Fried truck because he used to be employed as a driver. They followed the truck, observed the truck go to the Fried office at Clymer Street and saw the drivers - - I don't remember if he mentioned the name - - get out of the truck, go into the Fried office. He said that he then, or prior to this, asked

Bikel - - he made the intention known that he was going to take the truck.

THE COURT: Bikel was the passenger?

THE WITNESS: Right.

He said that he saw the driver get out of the truck, go into the office, and that he, Simon, went over to the truck. Simon had in his possession a key that he had previously been in possession of when he was a driver for the company.

It was the right key and he opened the truck, put it in reverse, drove down, going the wrong way in reverse to Division Street and turned around, put it in forward and took off in the direction of the Brooklyn-Queens Expressway.

Bikel followed him and at this point he didn't know where he was going but he decided to head over to Kent Knitting, the store at 963 Kent Avenue.

When he got there, Bikel followed him and he asked Bikel to go rent a U-Haul truck so they could unload the merchandise.

He went to this location because it

was off the street. While you could see it from the street it was a little safer than doing the unloading out in the street. It is an alcove.

Bikel took off in his car to get the U-Haul.

Meanwhile, he testified that a friend of his, Louis Mancini, who he has known several years, he asked Mancini if he would be interested.

By this point he had gotten a look at the contents which were 8-track stereo units for automobiles. He called and asked Mancini if he was willing to negotiate a price on the load.

Mancini expressed immediate interest and was up there within an hour. Brach explained wherever he was and what he had and Mancini arrived within one hour.

THE COURT: Was this at the Kent Knitting Mills?

THE WITNESS: This is the same address. There are several businesses but the address is, I think, 963 Kent Avenue. It is where the other

two individuals are employed.

THE COURT: He called up from there?

THE WITNESS: I don't remember if he said specifically from there or if he used a pay phone or what.

THE COURT: The truck was there while he was calling up and he told Louis Mancini to come to the place?

THE WITNESS: He told him what he had and Mr. Mancini expressed an interest and subsequently arrived.

THE COURT: He must have told him where he was.

THE WITNESS: He told him he was at the knitting company on Kent Avenue and gave directions.

BY MR. APPLEBY:

Q Could you continue, please?

A Mr. Mancini arrived in a green van, we were told, and he was accompanied by a younger fellow known as Junior.

Q Do you know who that person is?

A Angelo Rosario.

He stated that the four of them, himself, Bikel, who eventually arrived back at the location with the U-Haul

truck, 20-foot U-Haul truck.

He, Bikel, Rosario and Mancini unloaded all the contents from the Fried truck first into the green van and then the balance of the merchandise was put into the U-Haul truck.

He said that Rosario drove off in the U-Haul truck and that Bikel - - no, Mancini took the green van and he said that Junior took the U-Haul.

THE COURT: Junior?

THE WITNESS: Junior is Rosario.

A (Continuing) We asked if he knew where the merchandise was, which he had indicated prior to the statement's beginning that he did.

That is sort of what prompted the whole conversation.

Q Did Mr. Brach state that he received any money at this location?

A I can't remember specifically. It seems to me that he stated that for some reason, I remember $20,000. It seems I didn't take a written statement. We were in a hurry and I think he said $20,000.

I am quite certain that he said at that point there was an exchange of money. I don't remember how much.

THE COURT: Right at the Kent Knitting Mills?

THE WITNESS: At the Kent Mills.

Q Could you continue, please?

A This was April 21st so for some reason I remember on April 15, he specifically said April 15, he had been down to Mancini's restaurant at 8 George Court in Cartaret.

THE COURT: Who went to Mancini's restaurant?

THE WITNESS: He stated that on April 15 Brach went down to this address at 8 George Court attempting to find Mr. Mancini because apparently he was still owed some money.

He said that when he got there he was told by, I think he knew his name, Al Greco, he mentioned Al or maybe it was Al Greco who he believed was Mancini's son-in-law.

Greco was at the house and Greco told him that Mancini was out of town in Florida but that he would see if he could get some money.

Mancini made a telephone call, at least one, and advised him that if he, Brach, were to follow Greco, Brach in his own car and Greco in his car, if he were to follow him he would get

$500 for him.

He said they drove south to New Jersey.

THE COURT: Al Greco said to Brach, "Mr. Brach, you follow me, Greco, and I will see if I can get you money"?

THE WITNESS: Because the other fellow was in Florida.

THE COURT: Did you say that Mancini had told Greco something? Did Greco make this statement on his own or after calling Mancini or what was the story?

THE WITNESS: No, sir, he, on his own initiative, testified - -

THE COURT: "He" being Greco?

THE WITNESS: Greco testified somebody.

THE COURT: I see, then he came back and said to follow him and he would try to get some money.

BY MR. APPLEBY:

Q Continue, please.

A They drove down to New Jersey, forty minutes south to New Jersey, to an area that Mr. Brach stated that he was sure he could find but just didn't know the name of the town or street. But, from memory, he was quite certain he

would be able to find it at a future date.

He stated that on the date they went down there, this being the 15, that they drove up to a residential house and parked in front of this house with a big truck, a red truck.

He said they went into the house and he was introduced to an individual named Johnnie. He was later identified as John Papernik. He said that John gave Al Greco $500 and that Greco in turn immediately gave him this $500.

Q John did not give the $500 directly to Brach?

A No.

THE COURT: This was John Papernik?

THE WITNESS: He said that Greco also asked John if he had any more radios and John said something to the effect, "Well, I don't want to get them right now. It is light. I want to wait until it gets dark."

Brach was certain, and I don't remember why or what he told us, he was certain in his mind that the radios were in the truck because he said, "I don't want to open the truck until it gets dark."

He took that to mean that that was

where the radios were.

THE COURT: Did he describe the truck?

THE WITNESS: Yes.

THE COURT: In front of the house?

THE WITNESS: I believe he described it. I think he said it was red.

Q Was it an older truck or a new truck?

A I don't know if we talked about how old or new it was.

Q Is that what Mr. Brach stated?

A That was the statement, right.

Q As a result of the information that he gave with respect to Mancini, Greco, Rosario and Papernik, what happened in my office?

A Well, you obtained an arrest warrant for Louis Mancini, for Al Greco - -

Q For the four individuals?

A Right.

MR. YOUTT: I object and ask that it be stricken.

THE COURT: Why?

MR. YOUTT: On the grounds of relevance to this particular case and also the prejudice.

THE COURT: I don't think it is

particularly relevant.

MR. APPLEBY: I think what subsequently occurred completely corroborates.

THE COURT: I will take it subject to connection.

Q So that there came a time when an arrest warrant was obtained for the four individuals?

A Yes.

Q Were there any arrangements made with respect to retrieving the goods that Mr. Brach just told us about?

A Yes.

Q Could you tell us what was done

A I had some of the agents from my office go over to Cartaret, New Jersey, and we gave them the arrest warrants.

Then Brach and myself and one other agent proceeded south to New Jersey for the purpose of trying to find this house.

Q Incidentally, Agent, before you get to the point where you go with Brach down south, was there any discussion had with respect to Mr. Brach's arraignment?

A Yes.

Q Could you tell us what that was?

A He agreed to sign a statement which was dictated, not dictated, but prepared by Mr. Appleby, to waive the

right to a speedy arraignment.

MR. APPLEBY: Your Honor, perhaps you can instruct the jury that on a person's arrest he is entitled to be arraigned before a United States Magistrate, so that they will understand.

THE COURT: Yes, he must be promptly arraigned before a United States Magistrate and given a hearing if he wishes it or he can waive it and subsequently be indicted. Is that right?

MR. APPLEBY: That is right.

THE COURT: He can have counsel appointed for him right then and there by the magistrate or he can have counsel appointed by the court later if he can't afford counsel.

MR. APPLEBY: Would you please mark this document as the next government exhibit?

THE COURT: He is entitled to be promptly arraigned immediately after arrest.

THE CLERK: Government Exhibit 10, a document dated April 21, 1975.

(So marked.)

Q Agent, I show you Government's Exhibit 10

for identification and ask you if you can identify it.

A Yes, that is the statement.

THE COURT: What is it?

THE WITNESS: It is the waiver of a right to a speedy arraignment.

THE COURT: All right.

MR. APPLEBY: I would move Government's Exhibit 10 in evidence.

MR. YOUTT: I made my objection and I will renew it at this time and not object further.

THE COURT: I didn't hear your objection on that.

MR. YOUTT: I think it was covered before and I am not waiving it but I am not going to press the issue further.

THE COURT: I don't know if that was covered.

MR. APPLEBY: I don't understand the objection. Could we have a side bar discussion?

THE COURT: Are you talking about the suppression hearing?

MR. YOUTT: Yes.

THE COURT: I will understand it that

the objection is made in this trial as well as in the suppression hearing.

It is overruled.

THE CLERK: Government's Exhibit 10, waiver of rights to a speedy arraignment, signed by Simon Brach April 21, 1975, marked in evidence.

(So marked.)

MR. APPLEBY: Please read it to the jury.

THE WITNESS: "I, Simon Brach, am aware that I have a right to be brought before a United States magistrate immediately after my arrest, today, April 21, 1975 at 3:30 p.m.

"However, I waive my right to a speedy arraignment and agree to be arraigned tomorrow, April 22, 1975, so that I may assist representatives of the United States Government in locating goods which I had previously stolen and sold to several individuals who, in turn, transported the goods to New Jersey.

"I have previously been read the Miranda rulings by Richard Appleby, Assistant

United States Attorney, in his office in the presence of Gerry O'Neill and Peter Reilly, United States Customs agents."

Signed Simon Brach and witnessed by myself, Joseph P. Reilly, Gerry O'Neill, and it is dated April 21, 1975 at 4:58 p.m.

THE COURT: All right.

BY MR. APPLEBY:

Q After Mr. Brach disclosed the identity of the four individuals were any discussions had with respect to testimony that he may give?

A There was some, yes.

Q Could you tell the members of the jury what that discussion was?

MR. YOUTT: I object.

THE COURT: I think it is part of the res gestae or part of the admissions, all right.

Q Please answer the question.

A As best I remember, the conversation was, Mr. Brach was advised that he would have to testify. There was some conversation relevant to how did he feel about that, was there any danger factor, was he cognizant of the fact that

should this matter culminate in what it appeared to be, some arrests - -

THE COURT: You mean other arrests?

THE WITNESS: Yes, that should this ever get to trial, would he testify.

THE COURT: You didn't say he had to, did you?

THE WITNESS: No.

Mr. Appleby was doing most of the interviewing at this point.

Q Now, did there come a point in this discussion with respect to - -

THE COURT: What did he say, did he say he would testify or wouldn't? You didn't give an answer.

THE WITNESS: He stated that he would testify.

Q Did he express any concern?

MR. YOUTT: Objection, your Honor.

THE COURT: Not concern. What else did he say?

I'll permit it.

A I don't remember how much detail.

THE COURT: He said he would testify?

THE WITNESS: Yes, sir.

THE COURT: Nothing else?

THE WITNESS: He may have said something else.

THE COURT: All right.

THE WITNESS: In effect he was asked if he would testify in court and in a grand jury, as best I can recall.

He stated that he would and there was further conversation relevant to these people, what kind of people, where did they hang out, any organized crime connection --

MR. YOUTT: Objection.

THE COURT: That is enough.

THE WITNESS: I am sorry. I am trying to answer the question.

BY MR. APPLEBY:

Q To your knowledge did Mr. Brach ever testify against the individuals in the grand jury or at trial?

MR. YOUTT: Objection, again, as to relevancy to this case.

THE COURT: I think the objection is sustainable because you have not continued

on with that.

MR. APPLEBY: Maybe I'm getting ahead of myself.

THE COURT: You are getting ahead of yourself.

Q There came a time when other agents, after Mr. Brach signed the waiver of speedy arraignment, other agents arrived in my office?

A Yes.

Q Tell us what happened after that.

A We gave three of the arrest warrants to some of the agents, told them to go down to Cartaret and stay put until I got to them on the radio. Then myself and Mr. Brach and another one of my co-workers drove south to New Jersey. We drove in the vicinity of Marlborough Township.

We spent the whole night looking for the house which Mr. Brach was quite certain he would find.

THE COURT: Who, what house was it?

THE WITNESS: It later developed to be Papernik's house.

Q You didn't know his last name at that point?

A No.

So we drove around for several hours and we couldn't find the house. We went up and down and we couldn't find

the house. It was dark and very remote and isolated in that area and we couldn't find the house so we terminated the search.

Q What did you do with Mr. Brach?

A We drove him back to Manhattan and he was lodged in West Street Federal Penitentiary.

Q What happened the next morning?

A We picked him up that morning and drove to the same area that we had been in the previous night. He felt that in the daytime it would be a lot easier for him to locate the house.

Finally we saw something that triggered a reaction, he remembered something and we found the house. It was about 2:00 o'clock or 3:00 o'clock p.m. We found it with a truck parked in front of it.

THE COURT: Was it a green truck?

THE WITNESS: It was a red cab.

THE COURT: A red cab?

THE WITNESS: Which I believe is what we were looking for. We were not looking for a green van, we were looking for a truck, now.

THE COURT: I see, a red truck.

THE WITNESS: Yes, sir.

Q You saw the red truck, right?

A Yes.

Q What did it look like? Old model, new model?

A It wasn't working. The battery was dead. It was old, twenty years old, maybe, about twenty foot, a straight job.

Q Did you obtain a search warrant for that red cab?

A Yes.

Q That was obtained from the United States Magistrate in New Jersey?

A Correct.

Q Did there come a time when you entered that truck pursuant to the search warrant?

A Yes.

Q What did you discover?

A It was 116 pieces of Mecca, 8-track stereo.

THE COURT: 116?

THE WITNESS: I think it was 116.

Q I show you Government's Exhibit 2 for identification and ask you if you can recognize this carton.

A That is one of the cartons.

Q There appears to be a piece of paper pulled off one of the sides.

A Yes.

Q Do you remember it being in that condition or did you discover that later?

A I noticed it right away. There were twenty cartons, some filled, some had a few pieces missing. I'd say approximately twenty pieces, only two did not have the facing ripped off. One of them is the other one you have there.

THE COURT: Twenty cartons held 116 pieces of Mecca?

THE WITNESS: I believe it was 116.

THE COURT: From the twenty cartons?

THE WITNESS: Yes.

THE COURT: Tell me how you know or if it is discovered how the cartons in the green van or U-Haul got into the red truck.

THE WITNESS: We didn't know how they got into the red truck.

THE COURT: Mancini drove them away?

THE WITNESS: In the U-Haul and green van.

THE COURT: This was Papernik's place?

THE WITNESS: Right.

THE COURT: What is the name?

MR. APPLEBY: John Papernik.

THE COURT: You are at Papernik's place, that is where the red truck is?

THE WITNESS: Right.

MR. APPLEBY: I know there was another carton marked for identification, where is it?

THE WITNESS: I know it was there two hours ago.

(Clerk gets carton.)

BY MR. APPLEBY:

Q I show you Government's Exhibit 1 for identification and ask if you recognize it.

A Yes.

Q Located within the carton is Government's Exhibit 3 and 4, 3 and 4 for identification.

A Yes.

Q How do you recognize it?

A Well - -

Q Did these come from the red cab?

A It is Mecca.

Q Did these stereos come from the red cab?

A Yes.

Q Government's Exhibits 3 and 4?

A Yes, they were all in there.

MR. APPLEBY: At this time I would move that Government's Exhibits 1, 2, 3 and 4 in evidence.

MR. YOUTT: I object to the introduction in evidence at this time.

THE COURT: No, I think they have been connected. I will admit them into evidence.

THE CLERK: Government's Exhibit 1, cardboard carton, marked 708, New York carton, Carton 56, marked in evidence.

Government's Exhibit 2, unmarked cardboard carton, marked in evidence.

Government's Exhibit 3, box containing Mecca stereo, marked in evidence.

Government's Exhibit 4, box containing Mecca car stereo, marked in evidence.

(So marked.)

BY MR. APPLEBY:

Q Now, Agent, you mentioned 116 units. Are you referring to the ster os themselves, the stereos within the cartons?

A Yes, just the units.

Q How many cartons were found within the truck?

A Approximately twenty. Twenty or twenty-one, I don't remember.

Q What percentage of the total load that was stolen did you find in the red cab?

A I think the whole shipment was a little under a thousand units, ten per cent.

THE COURT: What about cartons?

THE WITNESS: There were about twenty cartons.

THE COURT: I am talking about the whole shipment.

THE WITNESS: The whole shipment was 116 cartons with six in a carton.

Q Incidentally, did you investigate the value of these units at retail prices?

A Yes.

Q What is the value?

A Approximately $100 a unit.

Q For a unit?

A For a unit.

Q So if there were 1000 units that would be $100,000?

A Approximately, I am not positive. Somebody told me $100.

MR. YOUTT:I object to that.

THE COURT: I am afraid we are going to have to strike that out. It is not sufficiently precise.

THE WITNESS: What I did do was ask the Customs import specialist. He is an expert in this particular line and he appraised for me the whole value and the whole value was $45,000. His figure is the correct figure. That is what he did.

MR. YOUTT: Objection.

THE COURT: Sustained.

If you have any appraisal you bring it in. This is too remote.

Q After you found the goods in New Jersey at Papernik's house, approximately what time was it?

A Just about 7:00 o'clock.

Q Did there come a time before 7:00 o'clock when you realized that Mr. Brach was not going to be able to come back to New York in time for an arraignment?

MR. APLEBY: Please mark this.

THE CLERK: Government's Exhibit 11, holographic document dated April 22, 1975, marked for identification.

(So marked.)

Q When you learned you couldn't return to New York in time for an arraignment, what occurred?

A I called you.

Q As a result of talking to me, what happened?

A I called the United States Attorney and we advised that we had found the truck that we were looking for and we didn't have any idea what percentage of the merchandise was in there. It could have been the whole load. We advised that we found the truck and we would like to execute and get a search warrant.

Q Before this was there anything done with respect to a document in terms of Mr. Brach's arraignment?

A After calling the United States Attorney I was instructed to inquire from Mr. Brach if he would again be willing to have his arraignment delayed because it was now 3:00 o'clock or thereabouts and it would be difficult to attend to both matters.

He then wrote a little waiver of an arraignment.

Q He wrote it himself?

A Yes, very kind of sloppy, on the back of a piece of paper.

Q What did you do?

A I wrote it a little more neatly and he signed it.

Q I show you Government's Exhibit 11 and ask if you can identify it.

A Yes, that is the statement taken on April 22, in New Jersey.

MR. APPLEBY: Unless there is any objection I will move it into evidence.

MR. YOUTT: The same conditions, same rulings.

THE COURT: The same conditions and rulings.

Submitted in evidence.

THE CLERK: Government's Exhibit 11, signed waiver of speedy arraignment dated April 22, 1975, signed by Mr. Brach, in evidence.

(So marked.)

THE COURT: The first one was signed April 21 and this one is April 22.

MR. APPLEBY: "I, Simon Brach, am aware that I had a right to be brought before a United States Magistrate in the Eastern District of New York immediately after my arrest on April 21, 1975.

"However, on April 21, 1975 I waived

my right to a speedy arraignment and agreed to be arraigned on April 22, 1975.

"Since my arrest the United States Government still needs my assistance in locating the stereo components that I had stolen. I now further waive my rights to a speedy arraignment to April 23, 1975."

Signed by Simon Brach and witnessed by Gerry O'Neill and James Healy, statement taken on 4/22/75 at 3:20 p.m.

BY MR. APPLEBY:

Q Could you tell us what happened after you located the goods, Agent O'Neill?

A It appeared these were the things we were looking for. The importer told us it was the first shipment of this particular model. There was a little something different about it and the markings and the numbers on the box matched the bill of lading. That information made it apparent that this was the merchandise.

So we seized this and I arrested Mr. Papernik. I had the arrest warrants previously, a John Doe arrest warrant.

Q Also individuals were arrested that day?

A The other three were arrested in Cartaret.

Q What was done with respect to Mr. Brach after you found the goods?

A I asked one of the - -

Q Where was he taken?

A To a detention facility, I think in Hackensack. I didn't take him there. I asked one of the agents to drive him.

Q Where were the other four individuals taken?

A Over here. They were taken to our office and subsequently detained that evening in West Street, in Manhattan.

Q Mr. Brach was not arraigned that day, he was lodged at another jail in Hackensack?

A Yes.

THE COURT: He was taken to Hackensack on the 22, I guess?

MR. APPLEBY: It was the 22 that he was brought to Hackensack.

Q Drawing your attention to April 23, what occurred with respect to Mr. Brach?

A He was arraigned at the Eastern District. He was transported from New Jersey.

Q Was bail set on Mr. Brach?

A Yes.

Q What was the bail, do you recall?

A I think it was $20,000.

Q Was there any discussion with respect to Mr. Brach's bail at that time?

MR. YOUTT: I object to the introduction of this testimony at this time.

THE COURT: Is it necessary to bring it out?

MR. APPLEBY: Yes, could I have a side bar discussion for a moment, your Honor?

THE COURT: All right.

(Side bar discussion.)

MR. APPLEBY: Mr. Youtt is going to obviously attack the concession on the ground of immunity. I am just trying to bring out that he was concerned about the bail and not immunity.

MR. YOUTT: As I indicated previously, Mr. Brach is not going to testify in this trial. I have presented my suppression motion to the Court and I don't intend to press it as an issue before the jury.Although I would have an opportunity and right I don't intend to do it in this case.

THE COURT: He has not brought out anything with respect to Brach's statement that he wanted immunity. He just said "What are you going to do for me?"

He never brought out any testimony that Brach said that he would like to have immunity.

MR. YOUTT: The word "immunity" was part of the testimony.

THE COURT: Was not part?

MR. YOUTT: Agent O'Neill said he was searching for the word.

THE COURT: You are right. All right, you will see what he says. I don't see why you want to talk about anything further.

MR. APPLEBY: If he is not going to bring it out I don't see why I have to bring up the bail.

THE COURT: You still have redirect.

(End of side bar discussion.)

MR. YOUTT: I would ask that the jury be instructed to disregard the testimony about bail.

THE COURT: Yes, please disregard the

testimony about bail in all ways and whatever was said about bail. Please disregard it as being irrelevant at this time.

BY MR. APPLEBY:

Q Agent, to your knowledge did Mr. Brach ever testify against those four individuals for whom arrest warrants were obtained?

THE WITNESS: Objection.

MR. YOUTT: Objection.

THE COURT: Why is that necessary? Isn't it in the same category as the other question?

MR. APPLEBY: You are asking me why it is necessary?

THE COURT: I think, yes.

MR. APPLEBY: Could I explain it at the side bar?

THE COURT: Why don't you just drop it for the time being and see how the case develops?

MR. APPLEBY: All right, I have no further questions.

CROSS-EXAMINATION

BY MR. YOUTT:

Q Agent O'Neill, when you first began speaking with Mr. Brach about the facts of this case that you have related to the Court and jury this afternoon did Mr. Brach say anything to you with respec to his brothers in the business of the Fried Trading Company?

A When we first met?

MR. APPLEBY: I ask that the question be more specific.

Q Directing your attention to Mr. Appleby's office, which I believe was the first time when you began speaking in detail and asking questions in detail about the facts of this case of Mr. Brach, is that correct?

A Yes, sir.

Q On that particular date - - I believe it was April 21?

A April 21.

Q At the time when you first began speaking with Mr. Brach did he say anything to you about his brothers in the business of the Fried Trading Company?

A Yes, I had known that and I think one of them is peering in at me. Yes, he mentioned something about the brothers but I can't specifically go into what he said.

Q Which brother was he referring to, do you remember?

A Both.

Q Both Zigmond Brach and Nachman Brach?

A Yes.

Q Did he tell you that we had had a conversation with those individuals or one of them on a prior occasion, prior to March 5, 1975?

A It would have been two days before the theft, March 3.

Q Did he characterize that conversation as being in the nature of an argument?

A Yes.

MR. APPLEBY: I object to this.

Your Honor, I will withdraw my objection

THE COURT: You have redirect.

(Continued on next page.)

GRsf 2pm

CROSS-EXAMINATION

BY MR. YOUTT:

Q Was the subject of that conversation a request for a loan or advance of money to Mr. Brach?

A Yes.

Q Now, I take it that you discussed Mr. Brach's relationship to the otherbrothers and to the Fried family on prior occasions in connection with your investigation in this case, is that correct?

A I have discussed with the brothers? Prior to this? Yes.

Q Okay. Now, again referring to the -- how did you learn that Mr. Brach possessed keys to the truck that was stolen, that was taken?

A He told me.

Q I see. And you are referring to Mr. Brach?

A Yes.

Q That's how you learned of that fact, is that correct? You hadn't learned that earler in your investigation?

A I don't know if that's a fact but that's what I was told.

Q Okay. Did he ever -- did you ask him to produce those keys?

A No.

Q Did you ever obtain possession of those keys?

A No.

Q Did you investigate this particular event to the point of going and looking at the truck yourself? The truck that I am referring to now being the Fried Trading Company truck that was removed from the --

THE COURT: White truck.

MR. YOUTT: Yes.

A I've seen -- I've been over to the office, you know, on several occasions and I saw a white Fried truck which I assumed may have been the truck.

Q So I take it then that you were not called in to look at that truck at any place specific other than the Fried Trading Company?

A That's right.

Q Okay. I take it then when you came into the investigation of the case, the truck had already come back to the Fried Trading Company, is that correct?

A Probably. It probably had been recovered. I don't remember if the truck was recovered that day or the next day.

Q When you say that day, are you referring to the day that it was removed from the Fried Trading Company

area?

A Right.

Q Okay. When was the first day that you learned anything about the facts of this case?

A The date that the theft took place.

Q The same day. I see. Your office was notified by the New York Police Department, is that correct?

A Right.

Q When you recovered the boxes that now are -- exhibits in evidence, by boxes, I refer to the brown cardboard carton and the smaller blue cartons that are inside. These are cartons that you removed from the truck in New Jersey, is that correct?

A Yes.

Q The red cab truck?

A Right.

Q Now, have you had those in your custody since then?

A Yes.

Q I see. And so then you brought them to court, is that correct?

A I brought them to court, that's correct.

Q I see. You made some comparisons? I believe you testified on direct examination between the numbers or

certain numbers or identification material or data on these exhibits and the identification numbers in the various bills of lading, is that correct?

A Yes, sir.

Q I see. Is that serial numbers or is it model numbers or what corresponds?

A If you show me one, please, I'll --

Q A small box? Or the large carton?

A Just the large carton. The one with the -- that has the -- yes. On the --

THE COURT: What do you call these? The customs invoices?

THE WITNESS: Yes. The entry page that we -- that Mr. Appleby introduced to identify the -- the documentation for the merchandise in question, on the customs entry and on the -- the other relevant documents, they have a 708 in a triangle, New York, carton number. I think the carton numbers were one through 166 or one through 168.

Q So 708 would be the number of the shipment?

A That's --

Q The load?

A No, that's the marks, as they say, on the particular documents.

That corresponds with the model number in this particular case. It's a 708 Mecca unit.

Q And then that C/MO means what?

A That means that's carton number 56 out of the 166. In other words, if that carton said No. 242, there would be a possibility of a problem.

THE COURT: I don't see the 56.

THE WITNESS: It's there. Each box will have --

THE COURT: I see. I'm sorry.

THE WITNESS: Would be numbered consecutively one through 156. They've been known to --

THE COURT: All right.

MR. YOUTT: Your Honor, I have no further questions.

THE COURT: Any redirect?

MR. APPLEBY: None, your Honor. The Government rests.

THE COURT: All right. Very well, the Government rests.

You may step down. Thank you, Mr. O'Neill.

You want to make -- shall I excuse the jury for five minutes so you can make any applications?

MR. YOUTT: Yes, your Honor. I have an application.

6 THE COURT: We will excuse the jury just for five minutes.

(The following occurred in the absence of the jury.)

THE COURT: Very well.

MR. YOUTT: Yes, your Honor. I would like at this time to move for a judgment of acquittal pursuant to Rule 29-A of the Federal Rules of Criminal Procedure. I have a memorandum of law supporting the points that I would like to make.

THE COURT: Let me see it.

MR. YOUTT: If I may hand that up to the Court at this time?

THE COURT: All right.

MR. YOUTT: The issue which I'm addressing is the nature, the commerce nature of the shipment at the time that the goods were taken, admittedly in this case by Mr. Brach's statement.

THE COURT: Isn't this in the nature of a surprise, Mr. Youtt?

MR. APPLEBY: This is the first time I've received this memorandum, your Honor.

THE COURT: Don't you think this case of question of law should have been presented after the motion was made to suppress so that both the

Government and myself could look at the cases? You must have known that that was your defense.

MR. YOUTT: I knew that that was my defense but it was -- it's a matter of fact and in each one of the cases that I have researched, it was raised at this point in the trial as an issue of fact. As a matter of fact, your Honor, I anticipated that the Government would attempt to establish as a matter of fact the various nexuses of -- of the Government's interest to this particular matter, in order to establish that issue of fact. It started, this whole issue started in the affidavit of Agent O'Neill in which he made certain statements that the goods were still subject to the custody and control --

THE COURT: Stand over there, please.

MR. YOUTT: Sorry.

THE COURT: The point is, the affidavit of Agent O'Neill is not before me.

MR. YOUTT: That's correct but that's what I was relying on.

THE COURT: All we are talking about is the testimony of Agent O'Neill, is that right?

MR. YOUTT: That's correct.

THE COURT: The mere fact that it was picked up in New York by the piers, -- he's got the invoices

here, hasn't he?

You have the invoices? Mr. Appleby, do you have the invoices?

MR. APPLEBY: Yes, absolutely, your Honor.

THE COURT: Yes.

MR. YOUTT: The cases, your Honor, --

THE COURT: What I am talking about is this. Just wait a minute. You'll have all the time in the world to argue so you have to give me time to ask a few questions. The point that you make, I understand, is that this shipment had come to a rest before it was stolen and therefore, you are not stealing cargo which was moving in foreign or interstate commerce. Is that your point?

MR. YOUTT: That's correct. It had come to a rest either at the point that it was picked up by the driver for the Fried Trading Company or at the point where it was parked in front of the Fried Trading Company and some of the cartons removed from it. The cases support both of those propositions.

There are some cases that fall somewhere in the middle. Specifically a case, United States versus Concepcion from the Second Circuit, in which there was evidence introduced of a bonded driver taking the goods to a bonded warehouse. Now, in that

circumstance, there was an additional factor of federal jurisdiction. That's the factor which is missing from this case.

THE COURT: What factor? You mean, bonded?

MR. YOUTT: The fact that there was no nature of bonding in this particular case and there is no --

THE COURT: Let me ask a few questions. As I understand it, this theft was conceived when Brach, in a car occupied by Bikel, a passenger car, spotted the Fried Trading Company's truck on a Brooklyn -- Brooklyn Queens Expressway or what?

MR. APPLEBY: I believe, your Honor, that they were driving on the Brooklyn Queens Expressway and then saw the truck.

THE COURT: All right. They saw the truck. That's what I asked. All right. They followed it. Of course, at the time they followed it, it was certainly moving in foreign commerce.

MR. YOUTT: Your Honor, I dispute that point.

THE COURT: I know you do.

MR. YOUTT: I say that's a possible theory.

THE COURT: Let me finish the whole story so that you may then attack it afterwards but I want to finish it.

Now, it certainly was moving -- you say it

stopped when he picked it up at the pier, is that what you say?

MR. YOUTT: There are two alternatives. Two points.

THE COURT: I don't think it stopped when it was picked up at the pier by any manner or means.

MR. YOUTT: I say it stopped either then or at the time it was parked and some goods were removed.

THE COURT: I will decide definitely that it didn't stop when it was picked up at the pier because to the contrary, but let us take the alternative, which may present a very difficult question for the Government, to overcome. That is, he sees this -- follows this truck. It stops at his stepfather's commercial house on Clymer Street and as soon as the man gets out with two cartons, he jumps on the truck and drives it away. Right?

MR. YOUTT: Shortly thereafter. The man was inside for ten minutes, he testified.

THE COURT: All right. Ten minutes. In that ten minutes, although the truck was not unloaded, you say the cargo had come to rest and it therefore became a domestic or state crime and not a federal crime.

MR. YOUTT: That's correct.

11

THE COURT: What do you say, Mr. Appleby?

MR. APPLEBY: Your Honor, my first impression or my first answer is that in 659 cases, I know that the cases have uniformly held that legal niceties and minute distinctions don't apply as to delivery and the practical common sense approach should apply.

THE COURT: Well, wait a minute. That's too broad.

MR. APPLEBY: Let me get more specific, your Honor. Your Honor, I'd answer it in two ways. First of all, the whole -- the joint effort -- a theft and a joint effort . The theft was conceived while the truck was actually moving in foreign -- in --

THE COURT: That I don't think -- the conception is not sufficient.

MR. APPLEBY: The Government is charged --

THE COURT: As far as the crime is concerned, --

MR. APPLEBY: At the time the Government had --

THE COURT: Wait. I don't know why I can't finish. You'll have all the time in the world.

MR. APPLEBY: I'm sorry.

THE COURT: The time the crime took place, the truck had stopped. No crime took place while they were following the Fried Truck regardless of their evil intent. Did it?

12 MR. APPLEBY: Your Honor, the Government has charged Brach and Bikel in this indictment although Bikel is not a defendant with Section 659, Section 2.

THE COURT: I know that very well.

MR. APPLEBY: All right. So the Government's theory could be that there was a -- a conspiracy in effect. To steal these goods.

THE COURT: I am not interested in conspiracy.

MR. APPLEBY: But the Government could -- there could be a joint effort or a joint enterprise. Even if the conspiracy is not --

THE COURT: That alone without an actual act is not sufficient. If you had charged conspiracy, then you wouldn't have to actually find a -- an offense, but you didn't charge conspiracy. Consequently, you have to find the offense. Now, the joint -- the joint agreement before the offense is not sufficient under this indictment.

MR. APPLEBY: All right. Furthermore, your Honor, I don't -- I know of one case, United States against Astolas --

THE COURT: I think he mentions here that here --

MR. APPLEBY: I don't understand how Mr. Youtt gets around that case.

13 THE COURT: He mentions it. He gets around it all right. That is, he thinks he gets around it. I haven't gotten around any of them yet and that may require me to pull down a few books. So that I might, under these circumstances, have to adjourn the case until tomorrow morning, which I'll give you my answer and if it's -- it it's -- a dismissal of the application, then you could go on and sum up.

MR. YOUTT: Your Honor, I'd be prepared to -- again, I suggest this to the Court. I'd be prepared to argue this tomorrow morning, would give Mr. Appleby an opportunity to review the case as I see it.

THE COURT: Yes. A little more than that. You nave to give me an opportunity.

MR. APPLEBY: One other thing, your Honor. I am thinking out loud, but in Astolas it says that the goods have to be examined or accepted. Now, I recall the testimony of Mr. Follman where he said he brought two cartons up to be examined and I recall also Mr. Follman smiling at Mr. Brach. I wouldn't be surprised if --

THE COURT: Mr. Follman?

MR. APPLEBY: Mr. Follman smiled at Mr. Brach when he got on the stand.

14

THE COURT: You mean, you knew all about this? This was going to be the --

MR. APPLEBY: I don't know.

THE COURT: Did you talk to Mr. Follman?

MR. YOUTT: We interviewed -- I interviewed Mr. Follman myself.

THE COURT: Did you?

MR. YOUTT: Several weeks ago. When we first came into the case. At that time Mr. Follman advised me that he removed --

THE COURT: You see, this is sort of a surprise and as far as who -- whether it was accepted or not, is another matter. If Follman doesn't know whether it is accepted or not -- he just said he took it up to be examined.

MR. YOUTT: That's correct.

THE COURT: He just said he put it on the elevator, if I am not mistaken.

MR. YOUTT: That's right.

THE COURT: That's all. He was told to pick it up. Pick up the rest, right?

MR. YOUTT: That's correct.

THE COURT: So there is no testimony that the whole load was accepted, Mr. Appleby. As I recall it.

MR. APPLEBY: No.

15

MR. YOUTT: No.

MR. APPLEBY: Just came to my mind. But I'd like to look at United States against Astolas because I believe that is the complete answer to this case.

MR. YOUTT: I suggest that certainly it is the leading case in the Second Circuit on this particular issue, the leading recent case.

THE COURT: My point is this, --

MR. YOUTT: I am prepared to distinguish it.

THE COURT: I cannot decide this right off the bat.

MR. YOUTT: I would suggest that we argue tomorrow morning, your Honor, after you and Mr. Appleby have had an opportunity to review the case that I cited.

THE COURT: He has to get up -- pick out one of his canned briefs he has on this point and let me have it, so I can look at it tonight.

Can you do that? You don't think they are canned yet?

MR. APPLEBY: I don't think it is canned, your Honor. Unfortunately, I have an appointment which I can't cancel. I'll just try to do the best I can. I'll try to get --

16 THE COURT: I don't see how we can try cases today. Of course, I was guilty of one appointment, but I have a job to do.

MR. APPLEBY: I know.

THE COURT: You have to persuade the jury. I don't have to persuade the jury about anything.

MR. APPLEBY: The only thing I'm asking, your Honor, --

THE COURT: You have to persuade me on a matter of law. If you can't do it, the Government has to get somebody else. What are we going to do, postpone the case for another day?

MR. APPLEBY: I was asking if I could recite some cases, rather than prepare a formal memorandum.

THE COURT: You can put it in a paper and -- not a formal memorandum. Put it in pencil on a yellow sheet and bring the cases down. While I am yet here. If you can Xerox it, you can give it to Mr. Youtt.

MR. YOUTT: That's fine with me.

THE COURT: Tonight.

MR. YOUTT: That's fine with me, whether it's tonight or tomorrow morning.

THE COURT: Tomorrow morning. But when do you have this appointment? How do you know I wasn't going to stay until 7:00 o'clock tonight? How can

* * *

GRsf 2am

(The following occurred in the absence of the jury.)

THE COURT: All right. Yes? I'm going to hear the argument. I want to start. Do you have an argument?

MR. APPLEBY: Yes, your Honor.

THE COURT: Let's have it.

MR. APPLEBY: All right. My argument is that when I first read Astolas a while back I thought it supported the Government's position. I reread it last night and I find that in fact it does support the Government's position that there is a foreign shipment and basically I rely on that case to find it is a foreign shipment.

In addition, I -- Judge Henderson gave a charge where he said in order to find a delivery you have to find an actual unloading or it being placed to be unloaded.

THE COURT: That's not sufficient either because his truck was stolen. Although it was on the premises to be unloaded and it was not unloaded. In fact, I remember it was sealed but it was stolen although it was on the premises to be unloaded, supposed to be unloaded the next morning and it was stolen. Even that is not sufficient as I recall.

All right. Next argument.

MR. APPLEBY: There is a case of Chapman against the United States. Where the Court talks about what constitutes --

THE COURT: Let's see Chapman.

MR. APPLEBY: Yes, sir.

THE COURT: I didn't see Chapman.

MR. APPLEBY: Incidentally, your Honor, the defendant cites in support of his proposition a case called O'Kelly. Chapman was decided in the same Circuit after O'Kelly and distinguishes O'Kelly.

THE COURT: Let's have it then.

MR. APPLEBY: All right. I'll hand it up to your Honor right now.

THE COURT: Why didn't I have that? All right. Let's see it.

MR. APPLEBY: There, your Honor, I think the facts bear out that the consignee had actually removed some sugar.

THE COURT: Yes.

MR. APPLEBY: The O'Kelly case, your Honor, there were 600 bags of sugar that were placed to be unloaded and 100 bags were actually taken off it by consignee. This is O'Kelly I'm talking about and there the Court said there had been a removal of

part of the delivery and there has been a delivery. But that's a far cry from Chapman and indeed, even a farer cry from this case wherein the testimony there was only two units of the stereos taken off. I would also contend that Gollin, United States against Gollin supports the Government's position.

THE COURT: What's that case? Where is that?

MR. APPLEBY: That was discussed in Astolas where there was the beer.

THE COURT: Did you read it?

MR. APPLEBY: Yes, your Honor.

THE COURT: Do you have it here?

MR. APPLEBY: Yes, your Honor.

THE COURT: Let have it. Yes. This is a later case.

All right, I'll listen to you, Mr. Youtt.

MR. YOUTT: Your Honor, as I indicated yesterday in my papers, indicate -- our basic argument is that the goods were delivered as a matter of law at the time that they were taken. The basis for this argument and confronting directly the Astolas case.

In the Astolas case clearly there was a sealed condition with respect to all four trucks. The three that were outbound and the one that was inbound. It was sealed in the same container, in the same truck

that had carried it interstate.

And consistent with earlier cases, which had been determined on the basis of the carriers seal still being intact, the Court held that the inbound shipment as well as the outbound shipment was interstate commerce since it was sealed and since no goods had been removed.

THE COURT: Yes. You think that -- how do you -- distinguish the Chapman case?

MR. YOUTT: Chapman, your Honor, involved also a carrier seal. In Chapman, the goods --

THE COURT: I know, but the seal -- they broke the seal and took some of the sugar out.

MR. YOUTT: And resealed it.

THE COURT: You mean the seal makes the difference?

MR. YOUTT: Certainly under the circumstances of the Chapman case where the goods were still at the railway terminal, the consignee came down and took some goods off but rather than taking all of the goods he said, "I'm going home, I'm coming back," and they resealed it at the carriers terminal on the carriers premises with the carriers seal. I contend that that's distinguishable. They certainly didn't overrule O'Kelly. That's the case which is most

akin to that case, where they had -- in the O'Kelly case, the goods were on a railroad spur. That spur was not in fact owned by the consignee but it was outside the consignee's warehouse. The seal had been broken, part of the goods had been removed.

THE COURT: I don't attach as much importance to seals as you do.

MR. YOUTT: Certainly, again, the seal is a symbolic exercise of custody and control by a carrier. In this case there was no seal because there was no carrier at this point when --

THE COURT: Wait a minute. There is no eating here in court.

All right.

MR. YOUTT: In this case there was no seal because there was no carrier. The seal, I think, indicates the point at which the carrier relinquishes control.

THE COURT: I don't think it makes any difference whether the carrier brings in the carload to the consignee or whether the consignee has his own driver. I think you've got to remember that the concept of foreign and interstate commerce in this context is a little different than interstate traveling or foreign traveling. It's a broader concept for the purpose o.

6 the enforcement of this statute.

Let me look at this case one second. There the consignee had accepted the car, had it not, and broken the seal and removed part of its contents and placed its private padlock on the door?

MR. YOUTT: That's correct, your Honor. And again the private padlock -- I don't think has -- has any independent significance just as a seal doesn't but it is an indication that the owner was exercising dominion and control over the contents of that car. And that was the decisive point as in this case where part of the goods were removed from the truck.

THE COURT: Well, you say in this case the owner has exercised dominion and control over the truck of stereos?

MR. YOUTT: Yes.

THE COURT: I don't think so.

MR. YOUTT: I contend that he did.

THE COURT: The driver was there. You really contend that the shipment came to rest at the pier?

MR. YOUTT: That's my first contention and I can address that also, your Honor. I feel that the case is --

THE COURT: No. I feel that the cases are quite different and I think you are wasting your time trying to convince me of that point. The only point

that I think you might have some question about legally is the fact that it was delivered in the front of -- 50 feet from, I believe, the front of Fried's place of business and the question is whether when that truck stopped -- you see, whether their load had come to rest or the shipment had come to rest. Now, if I followed your point of view that the shipment had come to rest when it reached the pier, or when it is put on Fried's truck, then if the truck was stolen on the Brooklyn Queens Expressway, right then and there, and hijacked, we couldn't - this Court wouldn't have jurisdiction and I wish to assure you, young man, there must be a thousand cases where that sort of thing has happened and hijackings have been held to be within the jurisdiction of this Court and the Southern District Court under similar circumstances.

MR. YOUTT: The reported cases all -- involving those fact situations had added facts. In one case, let me see if I have it in front of me. The early Second Circuit case involved a pickup from a New Jersey pier by the actual consignee while he was transporting it across the Hudson River, after he transported it across the river, it was hijacked. The Court held they were not going to approach the

question whetherit was still in foreign commerce after we picked it up from the pier, but we don't have to confront that problem because it was interstate after picked up.

Another case involved a pickup by -- this was the Concepcion case, involved a pickup by a bonded carrier enroute to a bonded warehouse.

THE COURT: You may have a little proposition with bonded.

MR. YOUTT: There was also custody and control and the Court held that to be the decisive factor and in the third case there was a situation where the goods were immediately to be transshipped into interstate commerce. There were orders placed for 46 out of the 91 cartons so that tomorrow morning they would be removed to another area and shipped into interstate commerce. The Court said, "We are not going to say whether it is foreign or interstate but it is one or the other because of the instant transition."

THE COURT: There is no interstate commerce here, in this case?

MR. YOUTT: That's correct.

THE COURT: Well, I think, Mr. Youtt, I -- I have discussed several of the cases and I, -- and particularly the Astolas case, and I am going to

9 decide this case against you, but I don't say that that is going to be the final answer. In the Court of Appeals you may be successful because I will say this is not a black and white case. It is a close case and the decision of the Court of Appeals might be directly contrary to my decision.

I will say this. I have -- the defendant Simon Brach moves for judgment of acquittal pursuant to Rule 29-A of the Federal Rules of Criminal Procedure at the end of the Government's case, on the ground that the Government failed to establish that the stolen shipment of stereo units covered by the indictment was moving as or constituted a foreign shipment of freight as required by 18 U.S.C., Sec. 659.

The basis for this argument is defendant's contention that the shipment came to rest and lost its foreign commerce nature when it was picked up at the pier by Fried Trading Company or, in the alternative when the shipment arrived by truck at the Fried Trading Company building at 188 Clymer Street, Brooklyn, New York.

The facts as developed in the testimony at trial which are relevant to this issue are as follows: One, the theft was conceived by Brach and Bikel in Brach's passenger car, when Brach spotted a

Fried Trading Company truck moving on the Brooklyn Queens Expressway.

Two, the truck had just picked up from Pier 12 in Brooklyn, approximately 166 cartons of car stereo units shipped from Japan.

Three, Brach and Bikel followed the truck until it arrived and stopped 50 feet from the Fried Trading Company place of business at 188 Clymer Street and, four, as soon as the driver of the truck left the truck, with two cartons, Brach entered the truck and drove it away.

Legally, if we are to carry out the purpose of 18 U.S.C., Sec. 659, relative to the phrase "Moving as or which are a part of or which constitutes an interstate or foreign shipment of freight," we cannot be hampered by highly technical conceptions.

United States versus Astolas, 487 F2d, 275, 279, Second Circuit, 1973. cert. denied, 416, U.S., 938, 1974. United States versus Berger, 388, F2d, 485, 487, Second Circuit, 1964, cert denied. 380 U.S., 923, 1965.

An interstate or foreign shipment does not lose that characteristic until it arrives at its final destination and is there delivered, either by actual unloading or by delivering complete possession

11 and dominion to the consignee.

United States versus Astolas, Supra, United States versus Yoppolo, 435, F2d., 265, Sixth Circuit, 1970, Chapman versus United States, 131, F2d., 740, CCA 8th, 1945.

The cartons in this case were shipped from Yokohama, Japan to their purchaser in Brooklyn, New York but never were delivered to the premises of the purchaser, the Fried Trading Company. Instead, the truck which carried the cartons from the pier stood on a public street, 50 feet from the entrance to the purchaser's premises and there is no evidence that the shipment at this location was accepted by the purchaser, especially since the entire load remained in the street while the driver brought two of the cartons into the premises for the purpose of inspection or acceptance.

Now, it would have made no difference in result if the truck had actually been stopped directly in front of the Fried premises. It was during the brief absence of the driver with the two cartons that Brach stole the truck containing the other 164 cartons. It seems that it was immediately after the driver stepped off the truck that Brach stepped into the truck.

12 Now, we find that at that moment the shipment had not come to rest because neither its delivery nor its acceptance had been completed. And that accordingly it was still part of a foreign shipment. We further find that the fact that the Fried Trading Company used its own truck to pick up the cartons at the pier, did not establish a point where the shipment was no longer a foreign one.

Delivery is not simply delivery to the consignee's truck and the cartons were still moving as a part of foreign shipment until they were delivered to and accepted by the consignee.

See, for example, United States versus Astolas Supra. Thus, this did not -- this neither occurred at the pier nor in the public street near or at the Fried Trading Company's place of business.

United States versus Jones, 446, F2d., 49, Fourth Circuit, 1971, cited by the defendant is not to the contrary because there the Court held that a suitcase at an airport remained in interstate commerce until delivered to its owner, although it had arrived at its stated destination.

Here, until the truckload was delivered to its purchaser on Clymer Street, it remained in foreign commerce, although it reached its country, city and

13 place of destination.

We find that the other cases cited by the defendant for a contrary conclusion are not in point and that the argument based on Younger versus Harris, 401, U.S. 23, 1971, is in this context without merit.

Accordingly, the defendant's motion is denied. All right.

MR. YOUTT: Your Honor, I have a couple of other matters.

THE COURT: All right.

MR. YOUTT: I have a couple of other matters. One other very brief aspect of a motion for a judgment of acquittal upon the ground that the Government has failed to establish a prima facie case. The only evidence of theft or stealing being that contained in a written statement by the defendant in a waiver of speedy arraignment.

I contend that on the basis of the record as it exists now, reasonable minds could differ as to whether or not there was a colorable claim of ownership which was the basis of the taking as opposed to a theft.

THE COURT: I don't think there is any evidence of a colorable claim of ownership by Simon Brach, the defendant. If you argue that, I will -- before the

14 jury, I will instruct the jury to the contrary.

That is your theory but you brought no evidence out. If you want to bring in evidence to that effect, that's another matter, but if you bring that in, I certainly will definitely tell the jury there is absolutely no evidence to that effect. You have that opportunity since the Government has rested and you still have a chance.

MR. YOUTT: We are not going to present a defense, your Honor. That's just the basis -- my motion is that the defendant -- that the Government has failed to establish a prima facie case on that issue and that's --

THE COURT: I have to deny that. I thought at the same time I ought to tell you, in your summation, if you are going to argue that, I will say there is no evidence to that effect and that's also the basis of my denial.

MR. YOUTT: I would move to strike all of the testimony from Agent O'Neill concerning the issuance of arrest warrants for the ultimate recipients of the goods in question in this case and all references to defendant's possible testimony against those individuals.

It was admitted subject to connection. I

think the only connection in this case is that some goods were actually recovered from those individuals or from the premises of those individuals. I would contend that in light of the fact that there has been no criminal prosecution and conviction in that case, that reference to arrest warrants is highly prejudicial to my client. Not only that but it is irrelevant to the issues of this case, that being the theft of goods from a foreign shipment. I would ask then that therefore --

THE COURT: You want them to bring in evidence of indictment against these people? Did you indict them?

MR. YOUTT: I don't suggest that, your Honor. I am just suggesting to bring in evidence of arrest warrants with nothing more, is prejudicial to this defendant who is not charged with that crime and who has no real --

THE COURT: As I understand it, in actuality it is predicated upon the testimony of Mr. O'Neill as to what Brach said.

MR. APPLEBY: That's correct, your Honor.

THE COURT: And the actual conduct of O'Neill and Brach in searching around through Jersey for the recipients of these goods and the actual finding

16 at thehome of Papernik of a red truck containing how many, 16 cartons? How many did they contain?

AGENT O'NEILL: Approximately 20 cases.

THE COURT: Twenty cases. I think that's sufficient. I think that's sufficient.

MR. YOUTT: Finally, your Honor, I am again talking about the jury matter, I have prepared two proposed requests to charge. Two requests to charge, one which is verbatim from the Astolas case except I interlineated the word "interstate" and changed to "foreign commerce".

The other charge is related to that and which I prepared on my own. I can hand it up to the Court.

THE COURT: Give it to me now, please. I might say that I have looked at the Astolas case somewhat carefully and the Astolas case -- you had a number of -- certain types of -- wait. We'll get it. Different types of thefts and the -- in one case as I recall, the -- as I recall the trailers were brought out to the midwest and were they stolen there? There were different ends of the shipment.

MR. YOUTT: One was an outbound -- three were outbound and one was an inbound.

THE COURT: Yes. It's the inbound which I thought was analagous to this case.

17 MR. YOUTT: Yes. I agree.

THE COURT: Where did they steal the outbound, enroute?

MR. YOUTT: They were all stolen at the same location as I recall. They had been sealed and were ready to go, with orders for the drivers to --

THE COURT: One going out and the other already coming in. No. Wait a minute. I think I'd give that in substance, the first one, Mr. Youtt. In substance I give you Number One.

MR. APPLEBY: I object to the second one, your Honor.

THE COURT: Yes. I will deny the second and grant the first.

MR. YOUTT: Your Honor, I would propose -- I would propose to argue and I'll bring it up now because I would rather have it at least -- at least a ruling on it if there will be a ruling. I would propose to argue to the jury in substance the argument which I made to you and which you rejected, concerning the question of whether the actual pickup at the pier constituted delivery as a matter of fact.

THE COURT: You can't. You are now arguing law.

MR. YOUTT: I would contend, your Honor, that

18 is an issue of fact.

THE COURT: I'll tell them that if they find that this truck was -- came from the pier and came to 188, is that it, Clymer Street, 50 feet from Fried's place of business, and the -- as soon as Brach got off of the driver's seat -- I mean, as soon as the driver got off of the driver's seat, Brach came in, they may find that it was part of a foreign shipment. That is my -- that is my understanding of the law. I cannot, if that is my understanding of the law, have you argue that the law is different.

MR. YOUTT: In effect then they are not -- they don't have the opportunity to deliver the issue -- the factual issue of when delivery occurred.

THE COURT: No. They have to find that it actually -- what I say actually occurred. They don't have to believe O'Neill and they don't have to believe anybody else, if they don't want to. But if they reach that conclusion, it is my decision that, as a matter of law, this shipment was still in foreign commerce. I am going to so charge. There would be no point in me denying your motion here this morning and then letting you argue that legal point before the jury. It is a matter of law and not a matter of fact. What is a matter of fact is whether they

believe O'Neill and the other witnesses.

MR. YOUTT: Again, I want to press in a little, your Honor, because I -- in my research I came across a case, I think it is the very Gollin case that Mr. Appleby cited to you in which the Court -- which it was held to be error not to submit the issue of fact --

THE COURT: I am submitting the issue of fact. I am submitting the issue of fact to the jury, to which they must find that if they can find that this happened, as I have described, if they don't find it happened that way, then, of course, it's not in foreign commerce but not what does -- not what the result is. The result is a matter of law. Not a matter of fact.

MR. YOUTT: The question of delivery is a matter of fact. What actually -- whether or not --

THE COURT: No. I disagree with you. I say delivery, here is a question of law, as I understand the statute. What I -- I say it must be actually delivered and I don't -- I am not 100 per cent sure that it is all a question of law, but in the context of this case, I am really stating by my charge that the fact that he stopped on Clymer Street, a public street and immediately Brach jumped into that truck, that is not delivery. Under the statute. That is what I am saying.

Now, they have to find that to be a fact. But other than that, it is law. I make myself clear and I think if I am wrong, you will have your exceptions.

MR. YOUTT: All right. But there are -- again there are other things which I am not sure whether I should be able to argue or not. The documents don't list Clymer Street as the destination. The bills of lading list no destination related to the Fried Trading Company and the customs' invoice listed Bedford Avenue as the ultimate destination.

THE COURT: I think I quoted to you that we cannot be hampered by highly technical conceptions under those circumstances and I think we'll have to brush that away, actually we know. Forget those documents, they don't have to list them exactly at Clymer Street. You mean to tell me because in the meantime, after this ship sailed from Yokohama, Fried changed his business place from 188 -- from Bedford Avenue to Clymer Street, that is going to make a difference?

MR. YOUTT: No.

THE COURT: Of course not.

MR. YOUTT: I contend that that bears upon the issue of fact when the delivery occurred.

THE COURT: No.

21 MR. YOUTT: If the papers clearly said Clymer Street, then that would be.

THE COURT: That is a matter of law again. You argue facts. You want to mix law in to this case before the jury, I am not going to let you do it. I say, as a matter of law, it doesn't make any difference.

MR. YOUTT: As the charge sets forth in the Astolas case, the wording is, it's delivered or placed -- by actual unloading or being placed to be unloaded. Certainly if you know.

THE COURT: That is Judge Henderson's charge. I don't believe Judge Medina agreed verbatim with that. He agreed that it has to be delivered or actually unloaded, as I understand it.

MR. YOUTT: He added the words, "accepted or inspected".

THE COURT: To be unloaded, as a matter of fact, you read the statute carefully, it said it really can be stolen from a platform. That is what 659 says. And I believe the test is whether there is complete dominion and control over the load when it stops and if it isn't, it's not been delivered. We are not going to let the jury decide questions of law.

MR. YOUTT: But can't -- again, dominion and control for purposes of delivery gets into the issue,

the factual issue whether the driver had --

THE COURT: You argue it to somebody else. I am going to tell you on the facts of this case if they find that this truck was stopped at 188 Clymer -- do I pronounce that right, Clymer Street?

MR. YOUTT: Yes. Clymer. That's the way I've heard it.

THE COURT: Clymer Street and Brach jumped in when the driver jumped out, I'm saying they can find that it was part of a foreign shipment.

MR. YOUTT: Are you saying they must find it under those circumstances? If you are, then I contend that it is taking the question of delivery from the jury.

THE COURT: I may be -- maybe under those circumstances it is the province of the Court to do that. I don't know but I am going to use the word that they may find that it was part, yes. I won't go so far, although perhaps I should, that they must find it. You see, the reason why I can't say must, they may not believe O'Neill.

MR. YOUTT: They have no reason not to. They have no reason not to, under the facts.

THE COURT: That is the facts of the case. The facts of the case were created by Mr. Brach. And he

just stole the truck, period. And it is clear he did and he confessed to it. He's not going to walk out of here on some high technicality which I don't believe the law justifies. He's going to--like everybody else, he's on trial He had his chance and the jury will decide whether or not he's guilty. That's it.

MR. YOUTT: I apologize for taking so much time on this. The reason I'm doing this, I don't want to overstep my bounds in closing argument.

THE COURT: I want you to take the time because that is your duty, Mr. Youtt. I want to get your thoughts but I just don't agree that they are a matter of law to be argued to the jury. You said, it is a matter of fact.

MR. YOUTT: I say the issue of delivery is a question which embraces the entire question of custody control, dominion, whether they'd been released from customs, whether or not they -- part of the goods had been removed.

THE COURT: No. I don't think we can do that. I am going to let -- released from customs. I don't believe, as a matter of law, they can find that delivery was made.

MR. YOUTT: I'm not asking for an instruction,

as a matter of law, that that constitutes delivery but I am asking for the latitude to develop that as an argument of fact.

THE COURT: No.

MR. YOUTT: On the issue of whether delivery was made.

THE COURT: No. I will find, if they find that the shipment came in at the pier and they were picked up pursuant to the documents from Yokohama -- as a matter of fact, I had something, where is my charge book? Do you have my charge book? As a matter of fact, I think we were going to find that the waybills alone are evidence of deliveries from which and to which a shipment was made. That's enough.

MR. YOUTT: But they don't show where, your Honor. They don't have any ultimate end.

THE COURT: They give it Fried. Doesn't it say Fried?

MR. YOUTT: Only the customs invoice says Fried and it says Bedford Avenue. Again this isn't the technicality that should immediately dismiss the case and you've ruled that it isn't -- of sufficient moment that it ought to be declared, as a matter of law. But I am saying, as a matter of fact --

THE COURT: I rule that waybills and shipping documents and -- let them look at them.

MR. YOUTT: The waybills?

THE COURT: Are evidence of deliveries from which and to which such shipment -- that's statutory.

MR. YOUTT: But the waybills don't even support it because they don't mention Fried. They don't mention Fried anywhere. Is that correct?

THE COURT: We know from the testimony that Fried's driver picked it up. This sounds like we are playing games.

MR. YOUTT: It is a fact which again -- I'm pressing it to its limits but I think --

THE COURT: Yes?

MR. YOUTT: It is an issue.

THE COURT: No. It is out. I will not take that. I say here that while the waybills -- listen to this, Mr. Youtt. While the waybills or other shipping documents of such are prima facie evidence of delivery, from which and to which such statement was made, there is a question which you must decide and that is whether in actuality a real delivery was made of this foreign shipment to Fried's place of business before the shipment was stolen. That's up your alley, right?

26 In this case the evidence was that Fried delivery -- that the Fried delivery vehicle stopped 50 feet short of the entrance to Fried's place of business on Clymer Street, which is a public street. The foreign character of the property stolen is essential element of the offense.

In this connection shipment commences at the time the property or cartons were placed on the ship in Yokohama, for foreign commerce and comes to -- into possession of those who are assisting it -- its course in foreign transportation and this foreign shipment continues until the merchandise arrives at its destination and is there delivered to the consignee either by actual unloading or by complete possession to the consignee.

MR. YOUTT: There is the issue. If we are going to argue complete possession, shouldn't I be able to say that complete possession started when we directed the loading of the truck at the dock.

THE COURT: No. I think you have to say -- if you find a reasonable doubt, if you find beyond a reasonable doubt the cartons were shipped from Yokohama, Japan, were picked up at the pier by one of Fried's drivers and that Fried's truck was then driven to its place of business, where the truck was

27 stopped in front of or 50 feet from the Fried place of business on Clymer Street, a public street, and that the shipment was stolen immediately after, immediately after the driver left the truck to deliver two cartons to Fried, then you may find that this shipment remained in foreign commerce at the time of the theft.

That is what my charge is and what you would like to say is -- I am perfectly willing, if you find that there was no delivery to the --

MR. YOUTT: Certainly again --

THE COURT: Let me finish and see what you think. There really was no delivery. You see, delivery again comes to a matter of semantics and I would have to say that if you find -- I would say it this way: If you find that at the time the driver left the truck that in fact -- you can't do it. That's in the face of the actual facts. Facts are facts and I have to recognize that.

I could say that if you find that at the time the truck was stopped in front of Fried's place, they had actual dominion and control over the truck and this was an actual delivery, then you may not find that it's part of foreign commerce, but I -- since there is -- since I will not say, as a matter of law, that that is a possible finding, because there are

some cases where facts are so outstanding, that a jury has no right to change them.

MR. YOUTT: The way I view this is, you are saying --

THE COURT: You view, it is a matter of fact. I view that under those circumstances if they find the conditions that I have already outlined, they may find. I don't even say, must, but I say they may find it is in the part of foreign shipment. I am not going any further than that. Anything else is -- would be -- seems to me, a somewhat hypocritical statement inasmuch as I know and you know from the evidence, if you believe these other men, that it stopped in front of Fried's place of business or 50 feet from it. Immediately there was a theft. It is a matter of law.

MR. YOUTT: If you have ruled, as a matter of law, what it -- in effect I think you've done is you've ruled that I am not entitled to a directed verdict -- to a verdict of acquittal on that particular issue from the bench. However, what I would say is that leaves this question of delivery, which you've acknowledged is a close question, to be not merely a pure question of law, but rather a question of fact. If you say then in ruling --

THE COURT: No. If they said that was not

a -- since there is no evidence whatsoever of dominion or control by Fried over that truck at that particular moment if they reach a conclusion, they reach a conclusion that this was a delivery, I would have to set it aside because there is no evidence.

MR. YOUTT: I think there is evidence. I think I can -- again, the evidence is that the shipping documents don't ultimately end up at Clymer Street, No. 1. No. 2, the driver went to the pier as was his normal course of affairs to do to pick these up. It wasn't ultimately shipped through to the Fried Trading Company. He chose the method of picking up, the destination, in fact of the point of changing the destination.

THE COURT: All that is immaterial, absolutely, absolutely immaterial elements. Real fact of the matter is, we know it was shipped very well to Fried. We know he picked it up. And we know he was on his way and the driver was to deliver it to Fried in front of the Fried premises. To talk about these other matters, whether it wasn't named in the -- it was named in the bill, the waybill, were they not?

MR. APPLEBY: The Fried Company? No, your Honor but the marks correspond to the customs invoices. In other words, there are identifying characteristics on the bills

of lading.

THE COURT: Who -- they were delivered to whomever may pick it up?

MR. APPLEBY: Who was the waybill delivered --

MR. YOUTT: It went to the customs broker, your Honor.

THE COURT: Yes. That customs broker was the broker for Fried. Is that right?

MR. APPLEBY: That's correct, your Honor.

THE COURT: If you want to bring out those facts? Do you want to bring out those facts? I'm asking you a question, Mr. Appleby.

MR. APPLEBY: The fact that it was brought to a customs broker.

THE COURT: And the customs broker was Fried's broker. He says that ought to be brought out. I don't think so. Because otherwise we wouldn't have Fried's truck driver picking it up, if it wasn't. In fact, Fried's truck driver said he had the broker's what? Do you understand the case, Mr. Appleby? You seem to be completely confused.

MR. APPLEBY: I don't understand the point of the customs broker.

THE COURT: Here is the point. It was not -- the waybill was not in the name of Fried but it was

31 in the name of Fried's broker, right?

MR. APPLEBY: That's correct.

THE COURT: That is, in my opinion, the same situation. Where it would be -- where it was a waybill directly to Fried.

MR. APPLEBY: I see your point now.

THE COURT: But he thinks that's a great point.

MR. YOUTT: I don't think it is a point from the standpoint of contesting that this was the proper shipment for Fried's but it is a point as to when dominion and control commenced. If papers said ultimately send shipment through to Richard Appleby at the United States Attorneys' Office, then we would have --

THE COURT: I think you can argue that to the Court of Appeals but I am not going to permit that. That is simply dust and confusion before the jury.

MR. YOUTT: Then in effect, what you are instructing the jury, if I can't argue these points then is that --

THE COURT: You can't.

MR. YOUTT: You must find, if you find that the truck was parked there and taken immediately thereafter you must find that.

THE COURT: I didn't say. You may.

32 MR. YOUTT: Then I must be able to argue something to the contrary otherwise "may" means "must".

MR. APPLEBY: The jury has to find those facts.

THE COURT: They have to find those facts?

MR. APPLEBY: To have occurred.

MR. YOUTT: If they find those facts from the way I'm being prevented from arguing these things, then it must be they must find. If that is the instructions, the -- otherwise I can't -- if it's "may" then I must be able to argue something and what I would propose.

THE COURT: That doesn't follow at all because I never instructed the jury what they must do. Because --

MR. YOUTT: They have no alternative.

THE COURT: I might as well direct a verdict of guilty.

MR. YOUTT: When we get to this point and I can't argue anything to the contrary --

THE COURT: I can't argue on that. I have already ruled. I've -- you made a motion, I have ruled. You have your protection by going to the Court of Appeals on my ruling. Once that happens, that ends it. You are not going to get two bites at the cherry by getting the jury to decide as a matter

33 of law whether or not there is a law. I find, if they can fi beyond a reasonable doubt what has happened here, as I have indicated it, it is my opinion that they may find that this shipment remained in foreign commerce at the time of the theft. You say, well, if I don't say they must find it, then that gives you room for argument. No. I don't believe that necessarily follows because they may not find in that -- in actuality that it remained in foreign commerce, but I don't believe that there is any argument that you have suggested which would be anything else but a legal argument to present to the jury.

Whatever reasons they wish for not finding the shipment remained in foreign commerce is a matter for their determination. But I am not going any further.

It is ten minutes after 11:00. We have been trying for a long time.

MR. APPLEBY: May I ask for one charge?

THE COURT: Yes.

MR. APPLEBY: You might have this already. I am asking for a charge which reads: The evidence in the case need not establish that the accused actually knew --

THE COURT: Wait a minute. You are talking down in your book and I don't hear you.

34 MR. APPLEBY: I would ask for a charge which says that the accused does not necessarily have to know that the goods were part of a foreign shipment.

THE COURT: Yes. I have said that. He doesn't contend that he -- that the accused does have to know.

MR. YOUTT: No.

THE COURT: His point is that he -- they could find that there was not a delivery. I tell you what I might do. If you find -- put this down. Let's see. If you find that at the time of the -- that at the time the truck stopped, that Fried had -- that Fried Trading Company had complete dominion and control over the shipment, you may find that the shipment did not remain in foreign commerce.

MR. APPLEBY: Your Honor, I think he --

THE COURT: Quick.

MR. APPLEBY: I think the jury is going to wonder what dominion and control means. That's why I think the instruction has to be more specific as to the facts.

THE COURT: Well, what --

MR. APPLEBY: Just saying dominion and control, they're going to be left wondering what does that mean.

35 MR. YOUTT: I'm prepared to tell them what it means, your Honor.

MR. APPLEBY: Then we'll have the same problem.

THE COURT: We are not going to do that. It is like possession. We are not going to do that. You are not going to transfer this case, this question of law to the jury, Mr. Youtt, under no circumstances. I will not permit it. It is a question of law. Either by actual unloading or by -- either by actual unloading or by complete possession. They understand that. That is enough. To the consignee. If you find there was -- they can't find there is actual unloading. But if you find that there was -- that the consignee Fried had complete possession of this truckload at the time it was stolen, then you may find that it was not a part of foreign commerce. They know what complete and -- complete control. I'll put it in there. That's enough.

MR. YOUTT: Can I say anything about it?

THE COURT: No. I don't think so. Because this is just confusion, worse confounded. They know what it is. What do you mean, can you say anything about it? To say they had control? What do you want to argue?

MR. YOUTT: I want to start --

36 THE COURT: You want to get him off although he admitted he stole the truck, period. Isn't that it?

MR. YOUTT: It happens, your Honor, in the case where federal jurisdiction -- it happened in the Bell case, in the possession of a weapon.

THE COURT: We are not going to be hampered by too many technicalities.

MR. YOUTT: I say that dominion and control and total possession, evidence of that, starts at the point when the driver directs the loading of that particular shipment at the pier.

THE COURT: No.

MR. YOUTT: And continues when the driver stops for a cup of coffee and continues on --

THE COURT: No. I will say, as a matter of law, that is not so. If they so found it, I would set it aside, if I could. I don't think I could because double jeopardy would prevent it and I will not have that. The answer to that is no. Because it is not so.

MR. YOUTT: I have no other way to argue.

THE COURT: Then you won't be able to do anything else about it except appeal to the Court of Appeals and have me reversed.

37 MR. YOUTT: How about the fact that he removed some of the contents?

THE COURT: No. I don't think that -- you could say -- you may find that they had complete control because he took two cartons upstairs. I think you might be able to say that that -- that they had complete control and possession because he took two cartons upstairs. I think that is about all you could say. You may argue that because I'm sure they must have argued that in the sugar case. That, I think, is a legitimate argument but the rest is simply confusion, worse confounded.

How is this: If you find that at the time the truck stopped at the Clymer -- at Clymer Street near Fried's place of business, that Fried's place of business, that the Fried Trading Company had complete possession, dominion and control over the truck then you may find that the shipment was no longer in foreign commerce at the time of the theft.

Okay. That's all. That's the best you can have.

MR. APPLEBY: Your Honor, I'm just thinking that perhaps there may be somewhat of a contradiction in your charge now because at one point you say you may -- if you find so and so, such and such and such

38 and such facts, then you may find --

THE COURT: No. I say if you find that the shipment was stolen immediately after the driver left the truck to deliver, then you may find that this shipment remained in foreign commerce or if you find that at the time the truck stopped at Clymer Street near Fried's place of business, that Fried Trading Company had complete possession, dominion and control over the truck, then you may find that the shipment was no longer in foreign commerce at the time of the theft. The question is -- the issue is complete dominion, control and possession by Fried. No more. That's it.

MR. APPLEBY: All right.

MR. YOUTT: Your Honor, I don't object to that charge.

THE COURT: You want more?

MR. YOUTT: I would want a more complete charge. I also want latitude to argue it.

THE COURT: No. The two points. No more. I have all your points. I am talking fast. You understand that I am not at all opposed to you arguing but I think I have all your points.

MR. YOUTT: I understand.

THE COURT: If I haven't, you don't think so.

39 MR. YOUTT: I do understand now and I just wanted to make sure that I fully understood before I argued.

THE COURT: I will interrupt. You can argue definitely that they had control at the time he stopped because he took two cartons. He'll argue the contrary.

MR. YOUTT: All right.

THE COURT: I'm going way out of my way to assist you. I think so.

MR. YOUTT: Your Honor, I indicated just a few moments ago that we were prepared to rest. I've just learned that the defendant wishes to call a witness. I would like just a few minutes to speak with him and determine.

THE COURT: If he calls a witness which opens up this problem in rebuttal, they still have a few, I think, similar transactions which they may introduce into evidence. To show intent.

MR. YOUTT: I understand that was the previous ruling.

THE COURT: All right. You go ahead and talk to him.

MR. YOUTT: Thank you.

(Recess taken)

40 (The following occurred in the absence of the jury.)

THE COURT: All right.

MR. THAL: Your Honor, I apologize to the Court for the delay. May we just have another two minutes.

THE COURT: All right. Take your time.

MR. YOUTT: Your Honor, I --

THE COURT: Step up, please, Mr. Appleby.

MR. YOUTT: I'm in the position, your Honor, where as I indicated to the Court we would not be putting on a defense. That is my strong recommendation to this client. It is my professional judgment that that's the only decision that I should make as a reasonably competent attorney at this time. However, the defendant indicates to me that he wishes to put on a defense. He wishes to summon witnesses.

THE COURT: For what purpose? To testify to what?

MR. YOUTT: Bearing upon the issue of the -- his claimed rightful possession of the goods.

THE COURT: All right. Then I must open the avenue to the rebuttal by the Government to place on -- into evidence the other similar transactions. If theft of the passenger car and also perhaps the knowledgable possession of stolen goods in the Fried

41 case as similar transactions of intent to steal. Because it does bring up that issue. So he knows what is going to happen and it is his decision and that is what we will do.

MR. YOUTT: I've discussed this with him, your Honor, and that is part of the basis of my --

THE COURT: I think your advice is very, very good at the time because now I excluded it on direct, so that it wouldn't becloud the issue but if he's going to come in with this other testimony, that it's his goods that he stole, I think I'd have to, don't you permit the Government to bring in the other testimony that I have already excluded.

All right. Bring him on. We'll bring them in. Do you have the witnesses? They have to be here.

MR. YOUTT: Your Honor, I have one witness here and the others are on call.

THE COURT: No. We have to go ahead.

MR. YOUTT: Is it your ruling at this time -- the defendant has indicated to me also and this is also against my recommendation.

THE COURT: You've done a very good job, Mr. Youtt.

MR. YOUTT: He's also indicated to me that if that were to be your ruling that he would wish to

42 testify.

THE COURT: Let him testify.

MR. YOUTT: If I know that will be your ruling --

THE COURT: It will be my ruling so he can testify too. And we have a real -- I think -- what I mean a bigger case than we had. When I say "we", the parties, not me.

MR. YOUTT: That's right.

THE COURT: All right. Let's go.

Bring the jury in.

(Jury present.)

THE COURT: Well, ladies and gentlemen of the jury, we apologize for this long delay, which had been caused by a long legal argument on both sides and we never thought it would take this kind of time. Otherwise I'd have asked the lawyers to appear at 9:00 o'clock in the morning but what I thought would be a ten or 15 minute argument turned out to be an hour and a half. Is it? Yes. So I apologize. All right.

MR. YOUTT: Your Honor, my first witness is out in the hall. My partner is getting her. It is Mrs. Simon Brach. She is here.

MR. APPLEBY: May I have a side bar for a moment?

THE COURT: Yes.

43 (Side bar follows)

MR. APPLEBY: I think of -- in view of what's happened, I mean, we're entitled to have an offer of proof from Mr. Youtt as to what she will testify to. I believe very strongly it will be irrelevant.

THE COURT: What will she testify? He is in an awfully impartial position so you have to be a little lenient with him, Mr. Appleby. What will she testify to?

MR. YOUTT: She is going to testify that Simon Brach still -- either still has or up until a point a couple of weeks ago still retained possession of keys to the truck and also apparently some sort of license that indicates that he had authority to drive the truck in question. That is all I know at this point because I really haven't prepared this witness. And haven't really discussed it with her.

MR. APPLEBY: Your Honor, I have to move to exclude this witness based upon that.

THE COURT: I don't think it is relevant.

MR. APPLEBY: He had keys. He admitted it.

THE COURT: Sure. I don't think -- I think it is irrelevant. The only trouble with that, you get into this business, you'll find him trying to introduce into evidence the fact that she has been found guilty

44 of herself having stolen goods.

MR. YOUTT: This is Mrs. Brach, not Mrs. Fried. She's his wife and she is a very nice person.

THE COURT: Yes, she is. I saw her down there. Not. That's irrelevant. This doesn't show ownership. I would have to exclude that.

MR. THAL: Excuse me. May we have 30 seconds?

THE COURT: Yes. I think that is irrelevant. He has admitted he had the keys. We know he had keys. This just takes time.

MR. YOUTT: I understand.

THE COURT: You can say you tried and the Judge says it is irrelevant.

MR. YOUTT: From what I understand, Mrs. Brach was just speaking with me -- with Mr. Thal. She wants an opportunity to speak with her husband concerning this whole matter.

THE COURT: Yes. They are doing it now.

MR. THAL: I have spoken to her. I've indicated to her our advice, our best advise.

THE COURT: You've done everything. All right. See what the answer is. You have to tell him he can't put that in.

(Open court)

THE COURT: All right.

45 MR. YOUTT: Your Honor, we call the defendant Simon Brach.

THE COURT: All right.

S I M O N B R A C H , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. YOUTT:

Q Mr. Brach, you are the defendant in this case, is that correct?

A Yes.

Q All right. You've heard the testimony in the trial so far, haven't you?

A Yes.

THE COURT: Wait a minute. Did you get his address?

Q Would you state your address?

A 938 43rd Street in Brooklyn.

THE COURT: 43rd Street?

A Yes, sir.

Q You've heard testimony that on, I believe, March the 5th, you got into a truck near your -- the Fried Trading Company and drove that truck away, did you hear that testimony?

A Yes.

Q Is that testimony true?

A Yes.

Q Would you describe to the Court and jury the reasons for the taking of that truck?

A When I was five years old my father died.

THE COURT: What?

THE WITNESS: When I was five years old my father died.

THE COURT: No, no. We don't want to confuse the jury with your personal history. We want to know -- as a matter of fact, I don't know the reasons whether --

THE WITNESS: The business was --

MR. YOUTT: Your Honor, may we approach the bench?

THE COURT: I don't think the reasons are relevant. The question is, did he take the truck or didn't he? He admits he took it.

THE WITNESS: Your Honor, --

THE COURT: Now, wait a minute.

MR. YOUTT: May we approach the bench for just a moment.

THE COURT: YES.

(Side bar follows)

MR. YOUTT: One second, please.

THE COURT: The reasons why he took the truck seem to me to be completely irrelevant. The question is, this: Did he own that property? Was it his own? If you want to bring out the reasons --

MR. YOUTT: I don't want to bring out anything.

THE COURT: It is all right with me. But I would think that that is going to open up a very long harangue and he's going to -- on cross-examination, he's going to say how about this. This is proper. He has him on there. He doesn't have to talk about similar transactions. It's all gone --

MR. APPLEBY: It is not necessary.

THE COURT: All right. Let him go.

You want him to tell the reasons?

MR. YOUTT: I don't.

THE COURT: That's all right.

MR. YOUTT: But I have no choice, your Honor.

THE COURT: All right. We'll do it.

MR. YOUTT: I intend to --

THE COURT: Very well.

(In open court)

THE COURT: All right.

MR. YOUTT: Can we possibly have that question read back?

THE WITNESS: Yes.

MR. YOUTT: Can you read that question back and start again?

(Read)

A When I was five years old my father died. We were left three brothers. I was the oldest and my mother was left until she remarried. Five years, me, my three brothers.

THE COURT: That's not the reasons you took the truck?

THE WITNESS: Right. The reason is --

THE COURT: You tell us the reasons you took the truck.

THE WITNESS: My mother remarried when I was 16 years old. From ten years old my mother remarried Mr. Fried and he came to the States with no money at all.

THE COURT: Tell us the reasons -- you understand what I am telling you to do?

THE WITNESS: Yes, I'm listening.

THE COURT: We're not interested in this back history, what your mother did or what your father did. We're interested in why you took the truck.

I don't have to go back to when you were five years old.

THE WITNESS: Because I'm part owner of Fried Trading Company.

THE COURT: All right. You are a part owner.

THE WITNESS: Fried Trading Company.

THE COURT: You are a part owner of the Fried Trading Company.

THE WITNESS: And me and my brothers, my mother, my stepfather, we all built up this business from scratch.

THE COURT: All right.

THE WITNESS: Since I'm 17 years old, I quit school and I started working for him and business was bad at that time. I started working in different areas, I was still part of the business from scratch on. And the latest -- and the last few years we got a lot of confusion, my brothers. I married and business started getting very good. And a few months ago, since my -- for a few months ago, you know, we get a big argument my brother and I told my brother, I want my part of this business. For that reason, I told him this I'm going to take the truck and came there that morning that I want to pick up the truck,

I was waiting there outside, when the truck came I had the keys and I have keys to the whole place. I used to have keys to the whole place that's why I took it.

THE COURT: All right. Anything more?

BY MR. YOUTT:

Q What did you do with the truck when you took it?

A I know people in the line because I used -- I used to sell people goods. I called up people that I know and I sold them the goods.

Q All right. You were arrested in this case at a later time, is that correct?

A Yes.

Q You gave a statement, did you, to the customs agent?

A It was like this. When I was arrested -- no. The customs agent, I told him, "How can you arrest me?" He says, "Your brother filed a complaint. We got a warrant for you." The customs agent tells me, "Listen, we want to know where the goods are." I told them that's where the goods are and now the beginning, I don't want to tell them nothing. Then he started, you know, confusing me with, you know, "We want to know where the goods are, we ain't going to bother

you, we ain't going to arrest you." So the day I was arrested I was brought over to World Trade Center and I was -- I still told them it's mine. My brothers -- you know, claimed it's -- it was stolen. And all that. At that point, you know, started getting me so confused that-- telling me, "You're going to go away to jail and you know you have a prior record, you're no good," so I told him it's still mine. He told me, "If you know where the goods are, you know, maybe we could straighten it out. You know, we ain't going to arrest you, we ain't going to prosecute you." I told him I sold it to -- and in order to -- I couldn't remember exactly where the stuff was, so he told me, "Sign this paper. That way you show us where the goods are." So I sign the form and then we finally find it. The following day we went again. He told me, "Sign the paper that you stole it and all this," and I signed the form and that was it.

MR. YOUTT: I have no further questions at this time.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. APPLEBY:

Q Mr. Brach, were you convicted in 1971 for possession and sale of a foreign shipment of freight that was stolen from a foreign shipment of freight?

A Yes.

MR. YOUTT: Objection, your Honor. I ask that it be stricken.

THE COURT: I will permit it.

Q What was your sentence?

THE COURT: No.

MR. YOUTT: Objection.

THE COURT: Objection sustained.

Q Were you convicted in 1972 for stealing a motor vehicle in New Jersey?

MR. YOUTT: One moment, your Honor.

THE COURT: Yes.

MR. YOUTT: May I just exclude some witnesses?

THE COURT: All right. They are witnesses?

MR. YOUTT: Yes. They just came into the courtroom.

THE COURT: They will have to leave.

All right. Go ahead. What is the question?

(Read)

BY MR. APPLEBY:

Q Excuse me. 1973.

THE COURT: All right.

A The answer to that is no. because I was convicted --

MR. YOUTT: I object also to that question, your Honor.

THE COURT: Overruled.

A At that time I was --

Q Just yes or no.

THE COURT: Just say yes or no.

Q In the for stealing a motor vehicle, the answer is no.

Q Were you -- all right. Were you convicted in an indictment with bringing in a stolen motor vehicle into the State of New Jersey?

A Yes.

MR. YOUTT: Again, objection.

THE COURT: Sustained. I mean overruled. The same ruling.

All right.

MR. YOUTT: The basis of my objection is Rule 608-B.

THE COURT: Yes. All right. Let's proceed.

BY MR. APPLEBY:

Q All right. Now, Mr. Brach, on March 5, 1975, were you working at the Fried Trading Company?

A At that time, I was not.

Q Yes or no?

THE COURT: Yes or no? Were you?

THE WITNESS: If I was working, no.

THE COURT: On March 5th? No. Was not working for Fried Trading.

THE WITNESS: How can I work if I own it.

MR. APPLEBY: I ask that be stricken.

THE COURT: What is that question? How can you work what?

BY MR. APPLEBY:

Q Isn't it a fact that you were fired previous to that date?

A I was never fired. I just had arguments with my brother.

Q Weren't you told that you weren't supposed to be around there anymore?

A No, I wasn't told that.

Q You had permission to be on the premises and to work there?

A There was nobody told me not to come. I just had arguments with my brother. There was nobody ever told me I shouldn't come to Fried Trading Company. Even a few weeks ago they needed certain things and --

THE COURT: Wait a minute. No one told you not to come but you didn't come, did you?

THE WITNESS: I used to come on and off.

THE COURT: Did you come on March 5th to work? Did you work there for a month prior to March 5th or not?

THE WITNESS: I was getting --

THE COURT: The answer is yes or no?

THE WITNESS: My wife was getting money.

THE COURT: I don't want that.

THE WITNESS: I was working there?

THE COURT: Yes.

THE WITNESS: No.

THE COURT: No. Next.

BY MR. APPLEBY:

Q You claim that you are a part owner of this company, is that correct?

A Right.

Q Do you have any documents that would prove that you are a part owner of that company with you?

A I don't have with me.

Q Can you produce them in court?

A I could produce it. I have to go to a rabbi. He has all the papers.

Q You have shares of stock in the company?

A I have to speak to my mother and bring the

share books.

Q Do you have shares in the company?

A I have shares in the company.

Q Do you own all the company?

A No.

Q You own a part of the company?

A Part, yes.

Q All right. Now, there came a time when you sold these goods to one, Louis Mancini, is that correct?

A Right.

Q And that was part of the regular business transaction as part -- of the Fried Trading Company?

A It wasn't part of regular because I had arguments with my brother and they stop giving me certain agreements I made with them and they just -- just arguments and I told them that I'm going to take out my part. When I seen a truck parked outside --

Q What percentage do you own in Fried Trading Company?

A No correct figure. The figure is -- no correct figure.

Q How much did you sell the goods to Mancini for?

A $?3,000.

Q Did you receive the money from him?

A Yes. In small portions.

Q And what percentage did you keep of that money?

A The whole thing.

THE COURT: You didn't give any part to the Fried Trading Company? Did you or didn't you?

THE WITNESS: No.

THE COURT: No.

Q Did you have any documents in connection with that business transaction with Louis Mancini?

A No.

Q No receipts?

A No.

Q Nothing at all to show that you had a business transaction with Mancini?

A No.

Q And none of that money was given to any of your family?

A I -- it's mine. I don't have to give it to nobody.

THE COURT: The answer is no?

THE WITNESS: I gave --

THE COURT: No, no, no. Yes or no?

THE WITNESS: No.

THE COURT: No.

Q You say that Mancini is a customer of the Fried's?

A Correct.

Q And there are documents showing that he's a regular customer?

A Yes, sir.

Q Now, does Louis Mancini have a store down in Carteret, New Jersey?

A Yes.

Q Is that at his residence?

A No. He has a store. You know, maybe now he doesn't have but he used to have a store and some small town next to Carteret.

Q You -- the Government's -- you know the Government's Exhibit where you signed the speedy arraignment?

A Right.

Q And it says there that you had stolen the goods?

A Right.

Q And you claim that you didn't understand that piece of paper, is that correct?

A For two day Customs O'Neill drove me around like a dope and -- no, I didn't understand what he made me sign.

THE COURT: He didn't understand it. That's it.

Q Do you read English?

A Yes, I read English.

Q But you didn't read that paper?

A When I was up in your office you told me in order -- you know, "We're not going to prosecute you, we just want the goods back. They claim it's stolen. It's interstate shipment." I told them it's mine. So he told me, I felt, you know, I felt a little shaken. They told me, "We ain't going to prosecute you. Just tell us who you took the goods to." I told them.

THE COURT: All right.

THE WITNESS: He wants me to sign this, I sign it for him.

THE COURT: You see what happens, Mr. Appleby, unless you are precise in your questions and -- this could go on for quite a while.

MR. APPLEBY: Yes, your Honor.

THE COURT: Please sit down.

All right.

MR. APPLEBY: One moment, your Honor.

(Judge was indicating a spectator for standing.)

BY MR. APPLEBY:

Q Do you claim that I made promises to you, Mr. Brach?

A Yes.

Q What did I say?

A You told me if -- if we got the goods back, you know, we -- you know, you know,"You tell us, you know, if you tell me where the goods are, you know, we can drop the case against you. You can testify against them."

Q I told you that I'd drop the case against you?

A You ain't going to prosecute me. That's what you told me.

Q Now, when you -- you recall being taken to West Street jail the first night?

A Yes.

Q Did you think you were being prosecuted at that time?

A You told me you couldn't arrange me for a hotel. You told me you're going to put me in jail.

Q I told you I was going to arrange a hotel for --

A Agent O'Neill told me,"We're going to arrange you in a hotel." Then, "We can't make no arrangements, it's too late, just to make sure you're available, we'll put you

in West Street."

Q When you were at West Street, did you think this was an alternative to hotel accommodations?

A This is what Agent O'Neill told me.

Q Do you remember when you were in Hackensack jail the second night?

A You were afraid you wouldn't be able to find me. That's why you held me. You were confused.

THE COURT: Who was confused? He was?

THE WITNESS: He was confused.

Q That's the reason that I put you in Hackensack jail?

A That's right.

Q I couldn't locate you in a hotel?

A Right. You felt that you took your six weeks to find me and you ain't going to have me available.

MR. APPLEBY: I have no further questions.

THE COURT: All right.

You may -- you want some more?

MR. YOUTT: Nothing further.

THE COURT: All right.

Please step down.

Any other witnesses?

MR. YOUTT: One moment, your Honor.

THE COURT: All right.

MR. YCUTT: Zigmond Brach, your Honor. The defendant has asked for Zigmond Brach to the stand.

THE COURT: Bring him in.

MR. YOUTT: I'm sorry. Zigmond Fried.

THE COURT: Zigmond Fried.

THE DEFENDANT: Zigmond Brach. It' my brother.

THE COURT: All right.

Z I G M O N D B R A C H , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. YOUTT:

Q Mr. Brach, where are you employed?

A By Fried Trading Company.

Q How long have you been employed there?

A Since my childhood. I just grew up in the business.

THE COURT: Do you think you can make that a little louder, Mr. Clerk, please?

All right. Very well, Mr. Brach.

Q Are you related to the defendant in this case, Mr. Simon Brach?

A Yes. I'm a brother.

Q I see. Are you familiar with the fact that on March 5, 1975, an investigation began concerning the taking of a Fried Trading Company truck?

A Yes.

Q All right. Would you tell us what part you had in that particular investigation?

A The part that I was -- I was still home the morning and he called me up, the truck is missing.

THE COURT: Wait a minute. Somebody called you up?

THE WITNESS: Yes. My brother called me, other brother called me up and told me the truck is missing.

THE COURT: All right.

THE WITNESS: So I went over and I called the police and I didn't know the moment who took the truck.

Q Did you later learn that your brother Simon Brach took the truck?

A Just from talking that he took it.

Q Did Simon Brach have a right to take that truck?

A His -- I'm not the one to say really that he had a right or not to take it.

Q Does Simon Brach -- well, would you describe the nature of the Fried Trading Company business? Who owns it? Is it a corporation?

A Yes, it's a corporation but it's more like a family business. We grew up together as little kids and we helped into it so we all considered as partners like.

Q Is Simon Brach a partner?

A Yes. The same partner as I am.

Q How long has he been a partner?

A Also since childhood, grown up together with it.

Q Is he still a partner?

A He still is, yes.

Q Was there any time when he wasn't a partner?

A No.

MR. YOUTT: No further questions.

CROSS-EXAMINATION

BY MR. APPLEBY:

Q Mr. Brach, isn't it a fact that you called Safe and Loft?

A Yes.

Q What is Safe and Loft?

THE COURT: Called what?

MR. APPLEBY: Safe and Loft of the New York City Police Department, your Honor.

THE COURT: Safe and Loft?

MR. APPLEBY: They investigate --

THE COURT: All right.

Q What do you understand Safe and Loft to be?

A Police. New York City Police Department.

Q You called the police?

A Yes.

Q After you learned that Simon had stolen the truck?

A No. After I learned it was stolen. I didn't know who took the truck.

Q Now, did you ever receive any money as a result of the Mancini transaction? Do you know Louis Mancini?

A Yes.

Q Did you receive any money from Mr. Brach?

A At this particularly -- moment?

Q Did he give you any money that he received from Mancini?

A Now, I wouldn't know. I don't know. Because he wouldn't give to me the money because we used to be in a fight always.

Q Well, you -- you heard Mr. -- your brother, Mr. Brach, testify that he received some $23,000?

A No, I didn't hear him testify.

THE COURT: He didn't hear. He wasn't here.

Q He received $23,000. There has been testimony to that effect. Do you know whether anybody at the

Fried Trading Company received any part of that $23,000?

A I don't know. I wouldn't know.

Q Would you have records to that effect?

A I wouldn't know because we always used to be in fights always. So we were jealous one of each other and he would never tell me and let me know anything.

Q You say Mr. Brach is a partner?

A Yes.

Q What do you mean by he's a partner? Does he receive profits from the company?

A It's like I receive, the same way. Like we grew up together and we all have like a share. It's no more like all -- all partner like.

Q Does he receive a share in the profits of the company at the end of the year?

A Yes. We always help his wife. Not particularly but we always give money his family.

Q You give him gifts from time to time or --

A I call him because he's a partner so we always give the family. We help out. We always give them money.

Q But these are basically gifts from time to time?

A It's not gifts. Not a gift because he is a partnership we give him.

Q How is it determined how much he gets?

A It's no determined. Just give all he needs.

Q It's on a helter skelter basis?

A All he needs like. The same way I take, all I need to live.

Q After a sale is made, what happens to the money. In a very large sale, what would happen to the money?

A We would deposit it in the bank normally.

Q Do you know, to your knowledge, whether any money from the Mancini transaction was ever deposited in the bank?

A I wouldn't know. Some days we deposit $100,000 a day. I wouldn't know exactly from that one or from which one. I wouldn't know exactly.

Q Would you be able to check whether any money from Mancini transaction was deposited?

A I guess I'd be able to check. Ask everybody. It's the only way I know.

Q I would appreciate if you do that.

A Okay.

MR. APPLEBY: I have no further questions.

THE COURT: Let me ask you this question. Do you know Joseph Neuman, the grocer?

THE WITNESS: Yes.

THE COURT: Did he talk to you after the truck

was taken away?

THE WITNESS: No. He talked to -- I wasn't there yet. I just came afterwards. I didn't talk.

THE COURT: Did he talk to you --

THE WITNESS: They said that he talked but not to me.

THE COURT: What did he say?

THE WITNESS: They said that he said that he don't -- that it looked like Simon but he wasn't sure.

THE COURT: Then you knew then?

THE WITNESS: What?

THE COURT: You knew it was Simon?

THE WITNESS: No. He said that it looked like him but he wasn't sure.

THE COURT: Does Simon work there now? Does he work for Fried Company?

THE WITNESS: Sometimes he helps out.

THE COURT: No. But is he employed there?

THE WITNESS: Normal on the payroll, no, he's not.

THE COURT: He's not on the payroll?

THE WITNESS: No, because we're like into a fight, that's why.

THE COURT: Did you authorize him to take this

truck?

THE WITNESS: I'm not the one to authorize.

THE COURT: No. But did anyone authorize him to take the truck?

THE WITNESS: There is nobody to say no because he has the same permissions as I have to take it.

THE COURT: All right.

THE WITNESS: If I could take it, he could take it, too.

THE COURT: No questions.

All right. Next. Anything else?

MR. YOUTT: Nothing further of this witness, your Honor.

THE COURT: All right. You may step down.

MR. YOUTT: The defendant has requested that I call Nachman Brach to the witness stand.

THE COURT: All right.

(Continued on next page.)

NACHMAN BRACH, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. YOUTT:

Q Mr. Brach, what is your employment? Where are you working?

A Work in the Fried Trading Company.

Q How long have you been --

THE COURT: Can you talk a little louder.

THE WITNESS: Yes. Work in the company Fried Trading.

Q How long have you worked there?

A About seven years.

Q Is Simon Brach a relative of yours?

A Yes. He's my brother.

Q Has he worked at the Fried Trading Company?

A Yes, he started off before me.

THE COURT: A little louder, Mr. Clerk.

THE CLERK: Your Honor, I will.

THE COURT: That's all right.

A He started off before me. After I went in the company to help out.

Q Is this a company that is in your family?

A Yes, a family business.

Q Does he have -- is he an older brother or is he a younger brother?

A No, he's an older brother.

Q Is he the oldest brother?

A Yes.

Q Does he have any interest in the company because he's an older brother?

A He have some.

Q What is that?

A Everybody have some shares. Not written shares. Everybody have a part.

MR. YOUTT: No further questions at this time, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. APPLEBY:

Q To your knowledge, did any member of the Fried family receive any money from the transaction that Mr. Brach had with Mancini?

A The time we didn't receive no money.

Q I'm sorry?

A If we receive any money?

Q Did any member of the Fried family --

MR. YOUTT: May I interrupt?

Q If you have any difficulty understanding my questions, just say so, all right?

A All right.

Q Did any --

THE COURT: May I ask this questions. It seems to me that Simon Brach testified he did not give any of the money from Mancini to the Fried Trading Company. What's the use of pursuing the problem -- the question any further. I don't understand that.

MR. APPLEBY: All right.

Q Do you know Joseph Neuman, do you not?

A Yes.

Q Do you recall March 5th when he came running into the Fried Trading Company?

A Yes.

Q And do you recall him saying that someone stole the truck?

A He told me, yes.

Q What did you do?

A At that time I was not so sure. In the meantime, we called the police, you know.

THE COURT: Who called the police, you or your other brother?

THE WITNESS: I called the police.

THE COURT: You called the police?

THE WITNESS: Yes.

THE COURT: By that time Mr. Neuman told you that Simon had backed the truck out?

THE WITNESS: No. We called before.

THE COURT: After you called the police?

THE WITNESS: He came to us, Simon took it.

MR. APPLEBY: No further questions, your Honor.

THE COURT: All right.

MR. YOUTT: One moment, your Honor. No further questions of this witness.

THE COURT: All right.

Thank you very much. Thank you, Mr. Brach.

Anything further? Anything more?

MR. YOUTT: Your Honor, the defendant does not wish to call any additional witnesses at this time and we rest.

THE COURT: All right.

You rest?

MR. APPLEBY: Yes, your Honor.

THE COURT: Everyone rests? Very well. We can sum up.

MR. YOUTT: Your Honor, may we approach the

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Charge of the Court

THE COURT: Members of the Jury, you have listened most attentively to the testimony and to the summations of the attorneys, the testimony presenting the facts through the witnesses, and the summations presented the arguments of the attorneys pro and con concerning those facts.

The time has come for you and for me to perform our respective functions in the trial of this case.

I have noticed you have been very patient and you have heard the voices of the attorneys and you have heard my voice and now your voice will be heard.

At the beginning, I wish to express my appreciation for your patience and your attentiveness and your alertness during the course of this trial, and also for any sacrifice that each and every one of you might have made in neglecting your business or your personal affairs to see that the ends of justice might be accomplished.

You have been also tolerant of these unavoidable delays which frankly has worried the Court when I think of you in the jury room waiting and waiting and waiting, but they were unavoidable.

I noticed that you were exceedingly interested in the task as the trial progressed.

Every criminal prosecution is important to the Government of the United States and it is equally important to the defendant on trial.

Each is entitled to equal justice in your hands and from my experience, justice is best dispensed in a calm and a patient and a careful and a deliberate manner. That is really in sort of a low key, as they say.

I sincerely request that you will keep that attitude when you go into the jury room and begin your deliberations.

Of course, you should talk to each other and respect the viewpoints of your fellow jurors.

In talking to each other with consideration and intelligence, you decide the issues here on the merits and on the merits alone.

You have heard the evidence. You have heard the argument of counsel and now it becomes my duty to give you the law governing this case.

It is your duty to accept the law as it is given to you by the Court and to determine the facts of the case for yourselves.

The proper application of the law of a case to the facts of the case, as you find those facts to be, will determine your verdict.

I wish to make it plain to you that the sole responsibility and the sole power in determining the facts are with you. Anything I may say or seem to say as indicating any view or opinion as to the facts is to be completely ignored by you.

In determining the facts, you should not be influenced by any rulings that the Court may have made during the trial. Those rulings dealt solely with matters of law. They did not deal with any questions of fact.

Of course, the Court's ruling on an objection made by either of the attorneys or upon any questions which the Court posed or any witness, are not to be considered by you as indicating either the guilt or the innocence of this defendant.

And, of course, the same is true with respect to any inflection of the Court's voice relative to such a matter, or in connection with any comments or statements the Court may have made to any of those attorneys or to either of these attorneys, rather.

The Court expresses no opinion as to the

guilt or innocence of the defendant. The determination of such guilt or innocence is a matter which rests exclusively with you.

There are some general principles of law which are of importance in every criminal case and I wish first to make some statements which will apply to criminal cases in general, and after which I shall endeavor to make clear to you what this particular case involves.

It is an established principle, members of the Jury, that an indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused. It does not create any presumption or permit any inference of guilt against this defendant.

It is also a principle well recognized in law that every person who is charged with commission of a crime is presumed to be innocent and the burden rests on the Government to prove to your satisfaction, beyond a reasonable doubt, every element of the crime and that the party is guilty as charged.

Thispresumption of innocence remains with this defendant all through the case until, if ever, it is overborne by proof which satisfies you beyond

any reasonable doubt that the presumption of innocence no longer remains with him.

Thus, you look at all the evidence introduced into this case and you ask yourself whether or not you are satisfied beyond a reasonable doubt that the offense has been committed as charged in the indictment.

If you are not so satisfied, then it would be your plain duty to convict him.

But if there exists in your mind a reasonable doubt of this defendant's guilt, then you must give him the benefit of that doubt and acquit him.

If there are two reasonable conclusions, equally supported by the evidence, one of which is consistent with the defendant's guilt and the other consistent with his innocence, then you must adopt the conclusion that is consistent with his innocence and acquit him.

The question of reasonable doubt is one which can be determined only by you. It cannot be determined by arguments or opinion of counsel.

In reaching a conclusion with respect to reasonable doubt, you must consider all of the evidence together and not just a particular segment or

not just testimony of one witness but all the evidence together.

So that you do not consider simply a segment or a portion of the evidence isolated from the rest of the evidence.

The term "reasonable doubt" as used in this charge does not mean any possible doubt you might have, but it means such a reasonable doubt as a careful, prudent and reasonable man or woman ought to entertain in the circumstances proved. It means a doubt based on reason and which is reasonable in view of all the evidence.

The key word is "reasonable." A reasonable doubt may arise from the evidence produced or it may arise from the lack of evidence in the case.

It is the obligation of the Government to prove a defendant guilty beyond a reasonable doubt, but it is not the obligation of the Government to prove a defendant guilty beyond a shadow of a doubt.

It is rarely possible to prove anything to an absolute certainty or beyond all possible doubt. Seldom can one prove a controversial fact with mathematical certainty.

A reasonable doubt does not mean a vain,

fanciful, vague, whimsical or imaginary doubt, nor does it mean a possible doubt, which is created by reluctance on the part of the Jury to perform an unpleasant task.

It means a doubt arising out of the evidence or lack of evidence, which is a reasonable doubt.

A reasonable doubt is a doubt that would cause prudent men to hesitate to act in matters of importance to themselves.

If after a fair and impartial consideration of all the evidence or the lack of evidence, you have a reasonable doubt as to this defendant's guilt, then it is your duty to acquit him.

On the other hand, if after a fair and impartial consideration of all the evidence, you believe that you have no doubt that is reasonable as to this defendant's guilt, then it is equally your duty to convict him.

One is said to be convinced in a case of this kind beyond a reasonable doubt when, after an impartial comparison and consideration of all of the evidence, one can conscientiously say that he or she is convinced to a moral certainty of the truth of the charge.

The machinery of trial calls for the exercise of varying functions by counsel and by the witnesses who testify, by the Court that presides, and by you, the Jury. And you as the Jury, exercise the fact-finding function.

As I told you before, you are the sole judges of the facts. That is to say, you must consider all the evidence. You weigh it. You draw inferences from the evidence, but only from evidence, and you must distinguish between the mere arguments of counsel which have been made before you and the evidence upon which those arguments were raised.

The repetition of an argument, however often, and how often loudly or dramatically made does not constitute evidence. You must carefully analyze the assertions which have been made to you by counsel for the defendant and by counsel for the Government, and you ascertain on what basis those assertions are in the evidence.

This brings us to the charge in the indictment.

MR. YOUTT: I have one, Your Honor.

THE COURT: All right. Very well.

The indictment, which I have told you before is not evidence, charges the defendant Simon Brach and Itshak Bikel as follows:

It says, "On or about the 5th day of March, 1975, within the Eastern District of New York, the defendant Simon Brach and the defendant Itshak Bikel with intent to convert to their use, did willfully and knowingly embezzle, steal, and unlawfully take from a motor truck approximately 166 cartons of car stereo units, having a value in excess of $100, which were moving as and constituted a foreign shipment of freight from Yokohama, Japan, to Brooklyn, New York, in violation of Title 18, United States Code, Sections 659 and 2."

Now, under this particular indictment, Bikel is not being prosecuted. You are not concerned with that. He has been severed from this particular case.

Now, Brach is charged with willfully and knowingly embezzling, stealing and unlawfully taking from a motor truck approximately 166 cartons of car stero units, with intent to convert the same to his own use, which stero units were moving as and constituted an interstate or a foreign shipment

of trade from Yokohama, Japan, to Brooklyn, New York, in violation of Section 659 of Title 18 of the United States Code.

He was also charged with aiding and abetting the theft of the goods moving as and constituting an interstate or foreign shipment of freight in violation of Section 2 of Title 18 of the United States Code.

I will not charge you on the aiding and abetting because I think this case has become a simple case against Brach himself as of the present time.

He was tried as a principal.

The pertinent portion of Section 659 of Title 18 of the United States Code claimed in the indictment to have been violated reads as follows, and I ask you to please listen to it carefully:

"Whoever embezzles, steals or unlawfully takes, carries away or conceals or by fraud or deception obtains from any wagon, motor truck or other vehicle or from any" -- there are stars here -- "platform or depot, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other

property, shall be punished as prescribed in the statute."

Now, the elements of this offense as appears from Section 659 of Title 18 of the United States Code are (1) willful and knowing theft or unlawful taking of goods moving as and constituting an interstate or foreign shipment of freight. And (2) intent to convert the same to the defendant's own use.

Two elements: Willful and knowing theft or unlawful taking of goods moving as and constituting an interstate or foreign shipment of freight. That is the first one.

(2) Secondly, intent to convert the same to the defendant's own use.

The burden is upon the Government to prove beyond a reasonable doubt both of these elements and failure to do so is fatal to the prosecution and entitles the defendant to a verdict of acquittal.

Now, it is not ncessary for the Government, however, to prove that the defendant knew that the goods were a part of a foreign shipment of freight. He did not have to know that. It is sufficient if you find, as a matter of fact, that

actually the goods were moving in and were part of or did constitute a foreign shipment, and while waybills and other shipping documents of such shipment are prima facie evidence of deliveries from which and to which such shipment was made, there still remains a question which you must decide, and that is whether in actuality a real delivery was made of this foreign shipment to Fried's place of business before the shipment was stolen.

Now, in this case, the evidence was that the Fried delivery vehicle stopped 50 feet short of the entrance to Fried's place of business on Clymer Street in Brooklyn, which is a public street.

The foreign character of the property stolen is an essential element to this offense. In this connection, shipment commences at the time the property or the cartons were placed on the ship in Yokohama for foreign commerce and thereafter it comes into possession of those who are assisting its course in this foreign transportation. And this foreign shipment continues until the merchandise arrives at its destination, that is, Fried's place of business, and is there delivered to the consignee by actual unloading or by presenting to the

consignee complete possession over which he has complete dominion at the time.

Until that occurs, the shipment is still a foreign shipment. It is not enough just to stop in front of the Fried place of business. If you find beyond a reasonable doubt that the cartons were shipped from Yokohama, Japan, were picked up at the pier by one of Fried's drivers, and that Fried's truck was then driven to its place of business where the truck stopped in front of or 50 feet from the Fried's place of business on Clymer Street, which is a public street, and that the shipment was stolen immediately after the driver left the truck for the purpose of delivering two cartons to Fried, then you may find that this shipment remained in foreign commerce at the time of the theft.

On the other hand, if you find that at the time the truck stopped at Clymer Street near Fried's place of business, that in actuality the Fried Trading Company had complete possession, dominion and control over the truck and the cartons, then you may find that the shipment was no longer in foreign commerce at the time of the theft.

The issue in this regard is whether Fried

had at the time such complete possession and dominion of the truck before it was stolen and it was no longer in foreign commerce.

The crime charged in this indictment requires a knowledge of an intent to commit the crime. It is obviously impossible to ascertain or to prove directly what a man knew or intended.

You cannot look into a person's mind to see what his intentions were or what he knew but a careful and intelligent consideration of all the facts and of all the circumstances shown by the evidence here in any given case as to a person's actions and statements will enable us to infer with a reasonable degree of certainty and accuracy what his intentions were in doing or not doing certain things, and also the state of his knowledge.

Knowledge, as well as intent, is descriptive of a state of mind, and as an element of the offense, is seldom if ever susceptible of direct proof.

The proof of this element of knowledge and intent may rest as it frequently does on evidence of facts and circumstances from which it clearly appears as the only reasonable and logical inference

that the defendant did willfully and knowingly intend to unlawfully take or steal the truck containing the stero units which were moving as and constituted and interstate or foreign shipment of freight.

I say it depends on the evidence and facts and the circumstances from which it frequently clearly appears that that is the only reasonable and logical inference.

I am not making a finding of that because that is something which you have to determine completely. But in determining knowledge and intent, you may consider the intelligence and sophistication or lack of intelligence and sophistication and experience of the defendant.

However, mere suspicion that something is wrong or improper is not equivalent to knowledge or intent.

On the other hand, knowledge and intent may be inferred from the acts of the party.

It is a question of fact to be determined from all the circumstances and the Jury may scrutinize the defendant's entire conduct at the time the offense is committed and no person can disclaim knowledge by merely closing his eyes to the facts which would otherwise have been obvious to a reasonable man.

The circumstantial evidence sufficient to support a charge of knowledge and intent must be sufficiently persuasive however as to exclude the inference of innocence under the circumstances.

The Government, as you recall, has put on the stand certain witnesses. That's the testimony of Israel Follman, I think his name was, F-o-l-l-m-a-n, and Joseph Neuman, who testified that the truck belonged to the Fried Trading Company at 184 Clymer Street, was driven away by Simon Brach, at least 10 minutes after the truck had stopped 50 feet from the Fried Trading building.

In fact, what happened was, as I recall the testimony, was that Israel Follman said that he was in the Fried Trading building for 10 minutes.

When he came out, the truck was gone.

Now, of course, it must have been taken away before the lapse of those 10 minutes. I don't know exactly how soon it was taken away but it was taken away before the expiration of 10 minutes.

You also heard the testimony of Joseph Karritus --

I think he was the superintendent of a building, and MacArthur Harvey concerning the unloading of the Fried truck by Simon Brach and others at the Kent Knitting Mills parking lot, into a small van and a U-Haul truck.

You also heard the testimony of Gerald O'Neill concerning the signed statements by Simon Brach to the effect that he stole the truck.

You will remember also that Gerald O'Neill stated that he gave Simon Brach his warnings, to wit, that he did not have to make a statement, did not have to say anything before he signed the document, and also he testified that while Simon Brach wanted to know whether a deal could be made, that the answer was no, but that he would not agree to give him any immunity but he would agree that at the day of sentencing, if he was found guilty, he, O'Neill, and the United States attorney would bring to the attention of the Judge the cooperation of Simon Brach.

I think you will remember that testimony, as well as I, and I will not detail the testimony of the witnesses because I know you will recall

them.

I am making these statements not because they are statements of fact. I could be wrong. I mean, that is my recollection of the evidence.

You will have to decide whether I am accurate.

Now, the defendant by his plea of not guilty has denied that he committed the offense charged.

What did he do? Well, a defendant, as you know, does not have to take the stand.

Defendant Simon Brach did take the stand. He testified in his own behalf. In fact, he also called his two brothers to testify.

Simon Brach claimed that the Fried Trading Company is a family partnership and that he had a right to take the truck, and that while he received $25,000 for the steros, he sold to Mancini, he never gave any part of that money to the Fried Company.

He also stated that he signed a confession to the effect that he stole the truck because he was promised immunity if he would tell where the Government could recover the stereos.

It was also brought out that he was -- you will remember this as well as I -- convicted on two prior occasions, one in 1971 and the other in 1973, in connection with stolen goods.

He admitted he was not working for the Fried Company at the time he took a truck and the argument has been made that this is a big family affair, and I think, as a matter of law, I must tell you that, of course, one can steal from a family, his own family, as well as he can steal from anyone else. But that is up to you to decide, not me.

I am not making any finding of facts. I am just telling you, as a matter of law, it is possible to steal from a family as well as it is from third parties.

Now, a defendant who wishes to testify is a competent witness, and his testimony should not be disbelieved merely because he is a defendant.

However, in weighing his testimony, you may consider the fact that the defendant has a vital interest in the outcome of this trial.

The two brothers testified that the Fried

Trading Company was a family company and that the police were called when the truck was taken and that they did not know at the time the police were called that Simon Brach took the truck.

Now, the Government's case against the defendant rests primarily on direct evidence and to some extent on circumstantial evidence.

As to the subject of circumstantial evidacne, I must inform you that it is evidence of a fact from which you may reasonably infer the existence or the non-existence of another fact.

For example, suppose you were in a room with no windows and a person comes into your home wearing a raincoat which is wet and carrying an umbrella which is wet, and that would be circumstantial proof that it is raining outside, though you did not otherwise know it was raining.

I am not going to go into too much detail in explaining circumstantial evidence. I will give you another example.

Suppose a member of the Jury were to ask one of the Court clerks whom we shall call Clerk No. 1 for a pad and pencil to make notes. And suppose that after the Jury took a recess and

the Jury came back and another Court clerk whom we shall call Clerk No. 2, not Clerk No. 1, to whom a member of the Jury first spoke, were to hand the juror a pad of paper and a pencil.

Now, that would be circumstantial evidence that Clark No. 1 had given the juror's message to Clerk No. 2.

As the words indicate, circumstantial evidence means evidence involving circumstances surrounding the incident, and the details, as distinguished from direct personal observation.

It is more then, and it is fundamentally different from a mere conjecture or surmise, for under our law, no man is to be convicted on the basis of guesswork or on the basis of speculation alone.

An inference that is reasonably drawn from the facts testified to is evidence. In analyzing the evidence, you may draw reasonable inferences based upon your own common sense and your general experience from any facts that you find were proved.

While an inference may be reasonably drawn from a proven fact, it may not be drawn from

another inference.

When two inferences may be drawn from a proven fact, one consistent with guilt and one consistent with innocence, you must draw the inference of innocence.

A logical inference is to be distinguished from sheer speculation or mere suspicion.

Circumstantial evidence is legal and acceptable evidence. It is the evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established.

Circumstantial evidence may consist of an accumulation of many details which are so logically interrelated, so consistent with each other, so inherently probable, that you may not have the slightest doubt as to its truthfulness and its accuracy.

As a general rule, the law makes no distinction between direct evidence and circumstantial evidence.

Circumstantial evidence may be enough to convict but circumstantial evidence must be so

convincing that it leaves you with no reasonable doubt.

All right. We now come to the credibility of witnesses.

In considering the evidence, you establish, you exercise the exclusive function of passing upon the credibility of the witnesses. You can see it is a very important function because, to determine where the truth lies, you must of necessity decide who is telling the truth.

How you are able to do this is left to your own determination. Among other things, in determining credibility of a witness, the Jury may consider his motive in testifying, his manner and demeanor on the witness stand, his interest, his prejudice, his bias, if any, whether he has a purpose or an interest to serve which might color his testimony.

Interest does not necessarily mean that a witness is untruthful, however. It is merely an element that you may consider in reaching your determination upon the question of whether he is telling the truth.

You consider the witness' demeanor and, to

use a colloquial expression, you size him up. When he tells you anything and you decide whether he strikes you as being a fair and candid witness who is telling you the whole story or whether he strikes you as a person who is not telling the truth, either intentionally or unintentionally, or just telling half the truth.

You may consider the witness' intelligence and his state of mind, his ability to know about that as to which he is testifying and whether he impresses you that he has a fairly accurate recollection of the matters involved.

Also you consider the inherent probability or the improbability of the witness' testimony, and of course, you should consider the inconsistencies or discrepancies, if any, in the testimony of a witness.

Ladies and gentlemen, in determining and examining credibility of a witness, the Jury is not bound to believe inherently improbable or unreasonable statements made by a witness simply because the witness who made them was under oath.

The Jury has a right, in appraising a particular witness' credibility as to all or part

of his testimony to consider the probability or the improbability of the testimony when viewed in the light of all of the circumstances and other evidence in the case.

If you find that any witness has knowingly testified falsely to a material fact, you may disregard the entire testimony of that witness, or you may accept that which you believe to be true and disregard the balance.

If you disregard his testimony altogether, and the guilt of this defendant depends on such testimony, then, of course, you may acquit him.

It is for you to determine whether a witness, whoever he is, is telling the truth as to all the facts or only with respect to some of the facts or whether he is telling the truth at all.

The test as to whether you believe a witness is the same test which you apply in your every day business or in your home affairs, where you are called upon to make this similar determination again and again, in these transactions.

You must not think, members of the Jury, that when you came into this Jury box, and you were sworn as jurors, that you were supposed to

lay aside all your common sense or your business or every day experience. That is simply not so.

You are now being called upon to use that business and every day experience and your common sense to assist you in determining the conflict in the evidence in this case.

In this case, there has been a conflict in the evidence between the testimony of Agent O'Neill and the testimony of Simon Brach. So it is going to be up to you to ascertain who is telling the truth.

Finally, you have been chosen as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the not guilty plea of the defendant as accused.

Let your verdict be without any prejudice and without any bias and without any sympathy. You are a fact finding body and it is your duty to decide whether the acts charged in this indictment have been committed beyond a reasonable doubt.

You are to perform this duty without any fear and without any bias and without any prejudice to either party.

The law does not permit jurors to be governed by fear, by sympathy, by prejudice or by public opinion. In arriving at your conclusion and your decision, you should consider the evidence in the light of your own experience and by the exercise of your own knowledge and your own common sense.

As I said, you must not permit any plea of sympathy to enter your verdict.

The accused and the public expect that you will carefully and impartially consider all the evidence, and you will follow the law as stated by the Court and you will reach a just verdict, regardless of the questions.

In conclusion, again, let me say it is your duty to weigh this evidence carefully, dispassionately, calmly and to reach a conclusion about the case as to the facts which are wholly within your finding.

The only question for your consideration is whether the defendant Simon Brach is guilty of this offense for which he is on trial.

If you are satisfied, beyond a reasonable doubt, that he is guilty, it is your plain duty,

to convict him.

If you have a reasonable doubt about the matter, it is equally your plain duty to acquit him.

Now, the punishment provided by law, if he is found guilty, is a matter which is exclusively within the province of the Court. You cannot an you should not allow any consideration of any punishment which may be imposed on the defendant to influence you in arriving at an impartial verdict as to the guilt or innocence of a defendant. It will be for the Court, if he is found guilty, to determine any mitigating or any other special circumstances which may require consideration in the case. You should not be concerned with the question of any punishment.

Ladies and gentlemen, all twelve of you must agree whichever way you find. In other words, your verdict must be unanimous. You must take the indictment --it only has one count -- and determine the guilt or the innocence of this defendant with respect to the indictment.

The form of your verdict should be: We, the Jury, find the defendant Simon Brach not guilty as charged; or: We, the Jury, find the defendant

Simon Brach guilty as charged.

If you wish any testimony of any witness to be read to you or if you have any questions, please send a note to the marshal who will relay this request to me.

Now, I know that jury service is not always pleasant and it is rarely convenient, but jury service is one of the keystones of our system of American justice and our form of democratic government. It is one of the few times that the people can participate in government itself.

I want to thank you each and every one of you for your attention, as citizens, and for your devotion, as citizens, to this very important work, almost essential work as jurors in a Court of law.

May you, acting in accordance with the evidence and the law as I have given it to you, by your verdict, declare the truth and you proclaim the cause of justice.

I repeat, if you desire to examine any of the exhibits, they may be delivered to you upon request or if, after you have retired, you desire to be informed on a point of law arising in the case, or have any part of the testimony clarified

you should ask to be returned to the Court for further instructions.

Now, at this point I will take a five-minutes recess so that I may hear certain applications to be made by counsel.

I strongly request you not to consider this case until you are brought back at the end of the short recess. You must not deliberate at all. Do not discuss it or talk about it until you are brought back, and you will be brought back in five minutes or less.

Thank you.

(Jury leaves the Courtroom.)

THE COURT: All right. Any exceptions?

MR. YOUTT: Your Honor, we have gone over the one exception.

THE COURT: Yes. You have made your point.

Let us see that the record is clear.

As I understand it, you are now again requesting that this Court charge Request No. 2 contained in your memorandum.

MR. YOUTT: Yes, your Honor.

THE COURT: And I am denying that request. So you have it on the record.

MR. YOUTT: My other requests is that the Jury be charged with respect to the prior convictions that they may consider that for purposes of credibility only.

THE COURT: You are quite right. You are quite right.

I will charge that.

What else?

MR. YOUTT: The only other thing is that I, just for the record, would like to renew the motions pursuant to Rule 29 for judgment of acquittal at this time at the close of the defendant's case.

I didn't do that. I just wanted to renew it for the record.

THE COURT: All right. For lack of -- I mean, because the --

MR. YOUTT: On the same ground as I recently stated.

THE COURT: All right. I will deny that.

MR. APPLEBY: Your Honor, did you intentionally leave out the flight charge? I assume you did.

THE COURT: Yes, I left it out intentionally because I don't think there was sufficient evidence to justify that.

The fact that you couldn't find him for six weeks is not necessarily evidence of flight and I think that would have been strong ground for error.

In times when you see a man running away from a truck after the police come, that's evidence of flight. But all you have here is failure to find him for six weeks.

I will not charge that.

Bring them back.

(Jury present.)

THE COURT: Just one little addition to my charge.

In just referring to some of the testimony, I mentioned that Simon Brach had been, according to the testimony, convicted on two prior occasions.

I wish to make it quite clear that those convictions are to be considered only with respect to one issue and one issue alone. That is the credibility of Simon Brach, as to whether you believe him or not. It is not evidence at all that he actually committed the offense charged in this indictment. That is all.

And now we will thank the alternate for

being so kind to be here acting as an insurance policy in case anyone got sick or failed to show up, but I am afraid we have to discharge you.

Did your lunch arrive?

THE CLERK: Yes, sir.

THE COURT: You may go. The marshal has your card.

You may now begin your deliberations.

Very well.

MR. APPLEBY: Your Honor --

THE COURT: Yes. Where are the marshals? You are not a marshal.

THE CLERK: I will swear them.

THE COURT: All right.

(Two male marshals duly sworn by the Clerk of the Court.)

THE COURT: Very well. Thank you very much, ladies and gentlemen. You may now begin your deliberations and I will stay here for a minute or two.

All right.

(The Jury began their deliberations at 1:55 p.m., and the following occurred in their absence.)

THE COURT: Gentlemen, I would suspect

that you could take an hour, I would think. If they ask for any evidence or exhibits, have I the permission of both parties to send them right in forthwith?

MR. YOUTT: Yes.

MR. APPLEBY: Yes, your Honor.

THE COURT: Sometimes they ask for the indictment and I make it clear, of course, that it is not evidence.

MR. YOUTT: I have no objection to the indictment going in.

THE COURT: I don't know what I was going to say.

Oh, one other thing. It is a big day. I have a dental appointment at 5:00 o'clock at 69th Street in Manhattan, which means i have to leave 4:00 o'clock or a quarter after 4:00, so I sincerely hope they can do something.

If not, I'll come right back. But if in the interim -- I'll call them in. If in the interim they want anything, they'll have to wait until I come back. That's the way it is.

Very well, thank you very much.

MR. YOUTT: Thank you.

(Luncheon recess taken.)

(The following occurred in the absence of the Jury, at 3:20 p.m.)

THE COURT: I have a statement here from the Jury. It says "Someone not sure whether it is a Federal case or not. Please explain."

I'll put it on the record. I don't know who the someone is.

Bring in the Jury.

THE CLERK: Court's Exhibit 1, Jury note, :Someone not sure whether it is a Federal case or not. Please explain."

(So marked.)

(Jury present.)

THE COURT: I have a note from the Jury which reads, "Someone not sure whether it is a Federal case or not. Please explain."

Ladies and gentlemen, the term "Federal case" has many meanings and is confusing.

You are not to decide whether or not it is a so-called Federal case. This Court is trying the case.

Therefore, it is within the jurisdiction of this Court and that is not the issue for you to decide.

What you are to decide, however, is whether

or not this defendant is guilty as charged, and one of the elements you must decide is whether or not at the time of the alleged theft the shipment was still a part of a foreign shipment.

That is the issue. You understand?

You do not talk about Federal cases because that will not help you. We sometimes refer to a Federal case in meaning so many other things. So, forget Federal case.

Now, let me again -- I can repeat what I said as to this foreign shipment aspect. That is the issue.

Let me see. If you wish, I will refer to my other charge as to the shipment of the cartons from Yokohama, Japan. Picked up at the pier by one of Fried's drivers. Fried's truck was driven to the place of business where it stopped in front of or 50 feet from Fried's business on Clymer Street, which was a public street, and that immediately thereafter, the shipment was stolen allegedly, after the driver left the truck to deliver two cartons to Fried.

I say if you find that, you may find that this shipment remained in foreign commerce at the time of the theft.

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I said, if you find that at the time the truck stopped at Clymer Street, Fried or near Fried's place of business, that Fried Trading Company had complete control -- possession and control of both the truck and its contents, then you may find that the shipment was no longer in foreign commerce at the time of the theft.

The issue in this regard is whether Fried had complete control and possession, dominion of the truck when it stopped at Fried's place of business.

Now, the fact that Fried owned the truck or had a right to actual physical possession of the truck and its contents does not mean that the truck was no longer in foreign commerce.

Only after there has been a delivery, that is, a complete physical possession and control of the shipment to the consignee, which in this case was Fried Trading Company will the shipment lose its characteristic of foreign commerce.

Arrival of the truck at its destination does not mean that the shipment has lost its characteristic as a foreign shipment.

Have I made that clear? I mean, there must be something more. It must be completely delivered

into the hands of the consignee and he has possession. If it does not, it has not lost its foreign control, foreign shipment. That is the only thing you decide. You do not decide whether it is a Federal case or State case. That is not before you.

Otherwise, if it was not a Federal case or at least as that term is used, I would not be here. You would not be here. But we are going to decide whether the Federal statute has been violated.

That's it. It was shipped -- well, this young lady says she does not seem to understand it yet.

JUROR NO. 3: Are you talking to me?

THE COURT: Yes.

All right. If you do not, I am willing to do anything else I can to help you.

JUROR NO. 3: I understand it and I do not understand it, to be very honest.

THE COURT: I will say this to you, that the concept of foreign commerce in the context of a statute is a little different than what we understand that term to mean.

It does mean that the shipment does not lose its characteristic as a foreign shipment until the person has complete control of it. If it is unloaded, then it is no longer a foreign shipment.

But the fact that it arrived at its destination at that moment does not mean it lost its characteristic as a foreign shipment.

The fact that the truck stopped does not mean it lost its characteristic.

It is not necessary for the wheels to go around to constitute part of a foreign shipment. I cannot help you, I don't think, any more.

Thank you.

(The following occurred in the absence of the Jury.)

THE COURT: Yes. It is a difficult concept.

MR. YOUTT: Again, your Honor, I would enter my objection on behalf of the defendant to that characteristic.

THE COURT: Yes, I think I suspected you would and I put it down, that you object to that definition. But you have something to say, Mr. Appleby?

MR. APPLEBY: No, your Honor.

* * *

GOVERNMENT EXHIBIT 5 - BILL OF LADING

722636

(GRACE LINE ACCEPTS NO RESPONSIBILITY FOR SHIPPER'S DECLARATION—NOT PART OF BILL OF LADING)

FORWARDING AGENT—[illegible]

EXPORT DEC No.

DELIVERING CARRIER TO STEAMER

CAR NUMBER—[illegible]

BILL OF LADING

(Conditions Continued from Reverse Side Hereof)

SHIP [illegible] VOY. NO.

FLAG

PORT OF DISCHARGE FROM SHIP

[illegible]

401843

CONSIGNEE: ORDER OF [illegible]

DESTINATION OF GOODS

(If goods are to be transshipped or forwarded after discharge from ship)

ADDRESS ARRIVAL NOTICE TO [illegible]

PARTICULARS FURNISHED BY SHIPPER OF GOODS

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
[illegible]		[illegible]		

(ORIGINAL)

[illegible]

LEONARD SATZ
[illegible] Broadway, New York [illegible]
HA 6-0975

GOVERNMENT EXHIBIT 5

NEW YORK [illegible] SERVICE

LOADED ON BOARD
DATE [illegible]
BY [illegible]

BEST COPY AVAILABLE

FREIGHT [illegible] IN

GOVERNMENT EXHIBIT 6 -- BILL OF LADING

722635

FORWARDING AGENT--REFERENCES

EXPORT DEC. No.

DELIVERING CARRIER TO STEAMER:

CAR NUMBER - REFERENCE

BILL OF LADING

(Conditions Continued from Page to Side Here)

SHIP

FLAG OF

PORT OF DISCHARGE FROM SHIP

PORT OF LOCA

401890

SHIPPER

CONSIGNEE: ORDER OF

DESTINATION OF GOODS

ADDRESS ARRIVAL NOTICE OF

PARTICULARS FURNISHED BY SHIPPER OF GOODS

MARKS AND NUMBERS	No. of PKGS.	DESCRIPTION OF PACKAGES AND GOODS	CUBIC FEET OR MEAS.	GR. WT.

ORIGINAL

PLEASE RETURN VIA
NEW YORK MESSENGER SERVICE

GOVERNMENT EXHIBIT

LOADED ON BOARD
DATE DEC 20 1962
BY

FREIGHT PAYABLE

RECEIVED from the Shipper, the goods or packages described herein, in apparent good order and condition, except as otherwise noted, to be carried by the vessel named herein or by any substitute vessel at the Carrier's option, and/or by other means of transportation, from the port of loading to the port of discharge or as near thereto as the vessel can safely get and lie always afloat, and there to be delivered to the order of the Consignee, upon payment of freight and all other charges due on the goods, and upon surrender of this Bill of Lading properly endorsed.

In accepting this Bill of Lading, the Shipper, Consignee and owner of the goods agree to be bound by all of its terms, exceptions, limitations, provisions and conditions whether written, printed, or stamped on the front or back hereof, or incorporated by reference herein, as fully as if signed by the Shipper, Consignee or owner, any law, custom or usage to the contrary notwithstanding.

The Shipper, Consignee and owner of the goods warrant that the goods are not destined to be used in any manner which will violate any law of the United States, including but not limited to the Export Control Act of 1949 and the Export Regulations issued thereunder, and further agree to indemnify the Carrier against any loss, damage or liability incurred as a result of any breach of such warranty.

GOVERNMENT EXHIBIT 7 - INVOICE 401843

733636

TREASURY DEPARTMENT

Attach Additional Sheets Here
Read Carefully Instructions for Preparation of Invoice
(THIS FORM DOES NOT REQUIRE CERTIFICATION BY A UNITED STATES CONSULAR OFFICER)

Form Approved.
GOVERNMENT EXHIBIT

SPECIAL CUSTOMS INVOICE

BUREAU OF CUSTOMS
(Original only required for customs purposes)

I. THIS SECTION TO BE FILLED IN FOR EVERY SHIPMENT

How were goods obtained by importer? By purchase or agreement to purchase [X] By some means other than a purchase [ ]
DO NOT INCLUDE PURCHASE AND NONPURCHASE GOODS IN SAME INVOICE. USE SEPARATE INVOICE FOR EACH

2. Place (city and country) and date obtained by importer	3. Name of exporting carrier	4. Date of shipment
Yokohama, Japan Dec. 27, 1974	"Victory Grandor"	Dec. 30, 1974

II. TO BE FILLED IN IF GOODS WERE PURCHASED OR AGREED TO BE PURCHASED

Name and address of seller: Kiyo Incorporated
8-8-13, Hirakawa-cho, Chiyoda-Ku, Tokyo

Name and address of purchaser: Fried Trading Co., Inc.
15 Bedford Avenue, Brooklyn, New York 11211

Date order accepted: Nov. 14, 1974

III. TO BE FILLED IN IF GOODS WERE *NOT* PURCHASED

1. Name and address of person from whom goods were obtained

2. Name and address of consignee

3. Name and address of person for whose account goods are shipped

IV. THIS SECTION TO BE FILLED IN FOR EVERY SHIPMENT

(1) Marks and Numbers on Shipping Packages	(2) Manufacturer's or Seller's Numbers or Symbols	(3) Quantity and Full Description of Goods (State contents of each package and importer's numbers or symbols, if any)	(4) Invoice Unit Price or Value	(5) Invoice Totals and Show Separately Packing Costs; All Other Costs, Charges, and Expenses	(6) Current Unit Price for Home Consumption in Home Currency	(7) Current Unit Price for Export to United States
708 NEW YORK OF NEW YORK C/No. 1-85 MADE IN JAPAN		506 sets or 85 cartons 8 Track Car Stereo Cartridge Tape Player with AM/FM/MPX Pls radio. Model: K-708 "The supplier and buyer are non-related parties."	p/set @$38.00 C&I New York	FOB Japan US$19,228.00 Marine Ins. prem. 147.65 US$19,375.65		p/set @$38.00

(8) Country of origin	(9) If rate of exchange is fixed or agreed, give rate	(10) If discount is freely offered, give terms, amount, and whether trade or cash
Japan		

V. THIS SECTION TO BE FILLED IN FOR EVERY SHIPMENT

1. IF GOODS WERE PURCHASED, have you stated in section IV, column 4, the purchase price of each item in the currency in which the goods were bought? [X] Yes [ ] No.
2. IF THE GOODS WERE NOT PURCHASED, have you stated in section IV, column 4, the price that you would have received or would be willing to receive now if the goods were sold in the ordinary course of trade for exportation to the United States? [ ] Yes [ ] No.
3. What currency was used in this invoice transaction? U.S. CURRENCY
4. Whether the goods were purchased or obtained by the United States importer in some other manner, have you stated in section IV, column 6:
   (A)(1) The price at which you are now selling the goods or offering them for sale for home consumption, including all applicable taxes? [X] Yes [ ] No.
   (2) Is this price freely offered to anyone who wishes to buy the goods for home consumption? [X] Yes [ ] No.
   (B)(1) Have you stated in section IV, column 7, the price at which you are now selling the goods or offering them for sale for export to the United States and whether this price is f.o.b., c.i.f., c.&f., or whatever the fact may be? [X] Yes [ ] No.
   (2) Is this price freely offered to anyone who wishes to buy the goods for export to the United States? [X] Yes [ ] No.
5. Have you listed all charges and stated whether each amount has been included in or excluded from the invoice amount? [X] Yes [ ] No. Is the inland freight included in the invoice price or value? [X] Yes [ ] No. Is the price or value of the goods the same at the factory as at the point of delivery? [ ] Yes [X] No. If the answer is No, have any sales been made at an ex-factory price? [X] Yes [ ] No.
6. Are any rebates, drawbacks, bounties, or other grants allowed upon the exportation of the goods? [ ] Yes [X] No. If so, have all been separately itemized? [ ] Yes [X] No.
7. If such or similar goods are being sold or offered for sale in the home market for home consumption, what taxes are applicable and are they included in the price shown in section IV, column 6?

Rate Nil Kind Nil

GOVERNMENT EXHIBIT 8 - -INVOICE 401896

72265

...RY DEPARTMENT

Attach Additional Sheets Here
Read Carefully Instructions for Preparation of Invoice

Form Approved.
Budget Bureau No. 48-R512.5.

(THIS FORM DOES NOT REQUIRE CERTIFICATION BY A UNITED STATES CONSULAR OFFICER)

GOVERNMENT EXHIBIT

SPECIAL CUSTOMS INVOICE

BUREAU OF CUSTOMS

(Original only required for customs purposes)

I. THIS SECTION TO BE FILLED IN FOR EVERY SHIPMENT

Were goods obtained by importer? By purchase or agreement to purchase [X] By some means other than a purchase [ ]

DO NOT INCLUDE PURCHASE AND NONPURCHASE GOODS IN SAME INVOICE. USE SEPARATE INVOICE FOR EACH

(city and country) and date obtained by importer
...ama, Japan Dec. 28,1974

3. Name of exporting carrier
"VICTORY GRAINOR"

4. Date of shipment
Dec. 30,1974

II. TO BE FILLED IN IF GOODS WERE PURCHASED OR AGREED TO BE PURCHASED

...and address of seller
Kiyo Inc.,1-8-13,Hirakawa
Chiyoda Ku, Tokyo,Japan

...and address of purchaser
Fried Trading Co.,Inc.
~~Bedford Avenue~~, Brooklyn, New York

...order accepted
14,1974

III. TO BE FILLED IN IF GOODS WERE *NOT* PURCHASED

1. Name and address of person from whom goods were obtained

2. Name and address of consignee

3. Name and address of person for whose account goods are shipped

IV. THIS SECTION TO BE FILLED IN FOR EVERY SHIPMENT

...S AND ...RS ON ...KING AGES	(2) Manufacturer's or Seller's Numbers or Symbols	(3) Quantity and Full Description of Goods (State contents of each package and importer's numbers or symbols, if any)	(4) Invoice Unit Price or Value	(5) Invoice Totals and Show Separately Packing Costs; All Other Costs, Charges, and Expenses	(6) Current Unit Price for Home Consumption in Home Currency	(7) Current Unit Price for Export to United States
		494 sets or 83 cartons	p/set	FOB Japan		p/set
708		8 track car stereo cartridge tape player with AM/FM/MPX radio	@$38.00	US$18,772.00		@$38.00
NEW YORK		Model: K-708		pls Marine Ins.144.13		
O. 86-168				C&I New York US$18,916.13		
E IN JAPAN						
		"The supplier and buyer are non-related parties."				

Country of origin	(9) If rate of exchange is fixed or agreed, give rate	(10) If discount is freely offered, give terms, amount, and whether trade or cash
apan		

V. THIS SECTION TO BE FILLED IN FOR EVERY SHIPMENT

IF GOODS WERE PURCHASED, have you stated in section IV, column 4, the purchase price of each item in the currency in which the goods were bought? [X] Yes [ ] No.

IF THE GOODS WERE NOT PURCHASED, have you stated in section IV, column 4, the price that you would have received or would be willing to receive now if the goods were sold in the ordinary course of trade for exportation to the United States? [X] Yes [ ] No.

What currency was used in this invoice transaction? U.S. CURRENCY

Whether the goods were purchased or obtained by the United States importer in some other manner, have you stated in section IV, column 6:

(A)(1) The price at which you are now selling the goods or offering them for sale for home consumption, including all applicable taxes? [X] Yes [ ] No.

(2) Is this price freely offered to anyone who wishes to buy the goods for home consumption? [X] Yes [ ] No.

(B)(1) Have you stated in section IV, column 7, the price at which you are now selling the goods or offering them for sale for export to the United States and whether this price is f.o.b., c.i.f., c.&f., or whatever the fact may be? [X] Yes [ ] No.

(2) Is this price freely offered to anyone who wishes to buy the goods for export to the United States? [X] Yes [ ] No.

Have you listed all charges and stated whether each amount has been included in or excluded from the invoice amount? [ ] Yes [ ] No.

Is the inland freight included in the invoice price or value? [X] Yes [ ] No. Is the price or value of the goods the same at the factory as at the point of delivery? [ ] Yes [X] No. If the answer is No, have any sales been made at an ex factory price? [X] Yes [ ] No.

Are any rebates, drawbacks, bounties, or other grants allowed upon the exportation of the goods? [ ] Yes [X] No. If so, have all been separately itemized? [ ] Yes [X] No.

If such or similar goods are being sold or offered for sale in the home market for home consumption, what taxes are applicable and are they included in the price shown in section IV, column 6?

Date ~~N.A.~~ Kind ~~N.A.~~

265a

GOVERNMENT EXHIBIT 10 - WAIVER OF ARRAIGNMENT

I, SIMON BRACH, am aware that I have a right to be brought before a United States Magistrate immediately after my arrest today, April 21, 1975 at 3:30 p.m. However, I waive my right to a speedy arraignment and agree to be arraigned tomorrow, April 22, 1975, so that I may assist representatives of the United States Government in locating goods which I had previously stolen and which I had sold to several individuals who, in turn, transported the goods to New Jersey.

I have previously been read my Miranda warnings by Richard Appleby, Assistant United States Attorney, in his office in the presence of Gerry O'Neill and Peter Reilly, United States Customs Agents.

Simon Brach
SIMON BRACH

Witnessed by:
Gerry O'Neill, USCS
Peter O'Reilly, USCS
April 21, 1975 at 4:58 p.m.
Richard Appleby
Assistant U.S. Attorney

GOVERNMENT EXHIBIT

GOVERNMENT EXHIBIT 11 - WAIVER OF ARRAIGNMENT

4/21/75

I Simon Brach, am aware that I have a right to be brought before a U.S. Magistrate in the Eastern District of New York immediately after my arrest on April 21, 1975. However, on 4/21/75 I waived my right to a speedy arraignment and agreed to be arraigned today, April 22, 1975.

Since representatives of the U.S. Government still need my assistance in locating the stolen components which I had previously stolen, I now further waive my right to a speedy arraignment until April 23, 1975.

Witness - Gerard E. O'Neil
James Dr. Healy

Simon Brach
April 22

Witness A.V. ... Magistrate ... New York

JUDGMENT OF CONVICTION

United States of America vs.

United States District Court for

DEFENDANT: SIMON BRACH — DOCKET NO.: 75 CR 503

District: East ... NY

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: 12 19 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived appointment of counsel.

[X] WITH COUNSEL Harry Youtt, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged. TIME A.M. P.M.
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.Code, Secs. 659 & 2, in that on or about March 5, 1975, the defendant, with another, with intent to convert to his own use, did wilfully and knowingly embezzle, steal and unlawfully take from a motor truck approximately 166 cartons of car stereo units, having a value in excess of $100 which were moving as part of a foreign shipment of freight from Japan to Brooklyn, N.Y.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why sentence should not be pronounced. Because no sufficient cause was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

5 years

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the defendant comply with the following conditions of probation during the period of probation imposed by this judgment: (1) refrain from violation of any law (federal, state, and local) and (2) from any change in residence or employment. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum period permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General

Signed by: [illegible]

[illegible]

268a

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
DEC 29 2 55 PM '75
U.S. DISTRICT COURT E.D.N.Y.

United States of America

- against -

Simon Brach

Docket Number 75 CR 403

Hon. John R. Bartels
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that Simon Brach appeals to the United States Court of Appeals for the Second Circuit from the X Judgment ___ order ___ other (specify) of conviction entered in this action on December 19, 1975 (Date)

Date 12-19-75

To: David Trager, Esq.
United States Attorney
225 Cadman Plaza
Brooklyn, New York 11201

Phone Number

Address

Harry E. Youtt
Thal & Youtt
919 Third Avenue
New York, New York 10022
(212) 751-3300

(Counsel for Appellant)

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

▶ QUESTIONNAIRE

X I am ordering a transcript
___ I am not ordering a transcript
Reason:
___ Daily copy is available
___ U.S. Attorney has placed order
___ Other. Attach explanation

▶ TRANSCRIPT ORDER

▶ DESCRIPTION OF PROCEEDING FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDING DATE)

Prepare transcript of
___ Pre-trial proceedings
X Trial
___ Sentence
___ Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment: X Funds ___ CJA Form 21

ATTORNEY'S signature Harry E. Youtt DATE 12/19/75

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals

Date order received	Estimated completion date	Estimated number of pages

Date ___ Signature ___ (Court Reporter)

BEST COPY AVAILABLE

ORIGINAL

A. 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS 2nd CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

SIMON BRACH,

Defendant-Appellant.

Index No. 76-1030

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

[illegible]or Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 13th *day of* Feb. *19*76 *at* 225 Cadman Plaza, Brooklyn, New York

deponent served the annexed appendix *upon* David Trager, United States Attorney

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* attorney *herein.*

Sworn to before me, this 13th *day of* Feb. *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA